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2522
No. 11884

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.
BEN ARNOLD,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana

FILED

APR 27 1948

PAUL P. O'BRIEN,
CLERK

No. 11884

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.
BEN ARNOLD,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana

No.11884

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.
BEN ARNOLD,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

MR. JOHN B. TANSIL,
United States District Attorney,
Billings, Montana.

MR. FRANKLIN A. LAMB,
Assistant United States District Attorney,
Billings, Montana.

Attorneys for Plaintiff, and Appellant.

MR. ROCKWOOD BROWN,
Billings, Montana.

MR. HORACE S. DAVIS,
Billings, Montana.

MR. FRANKLIN S. LONGAN,
Billings, Montana.

MR. MARION B. PORTER,
Billings, Montana.

MR. NORMAN HANSON,
Billings, Montana.

Attorneys for Defendant, and
Appellee. [1*]

* Page numbering appearing at foot of page of original certified
Transcript of Record.

In the District Court of the United States in and
for the District of Montana, Billings Division.

Civil Case No. 753.

CHESTER BOWLES, Administrator,
Office of Price Administration,

Plaintiff,

vs.

BEN ARNOLD,

Defendant.

Be it remembered, that on January 31, 1946, a
complaint was duly filed herein, in the words and
figures following, to wit:

COMPLAINT

Count I.

1. Plaintiff as Administrator of the Office of Price Administration brings this action for treble damages on behalf of the United States Pursuant to the provisions of Section 205(e) of the Emergency Price Control Act of 1942, as amended, (56 Stat. 23 U. S. C. App. Sections 901-946), hereinafter called the Act.

2. Jurisdiction of the action is conferred upon this court by Section 205(c) and 205(e) of the Act.

3. From February 1, 1945 to the date of this complaint defendant sold to divers purchasers to wit; Wallin Mercantile Company, Rosebud, Montana and Safeway Store, Number 1653, Forsyth, Montana for use or consumption in the course of trade or business beef carcasses, beef wholesale

cuts and bull carcasses which had not been graded; that maximum prices have been established under the Act for such commodities; that said commodities were sold by defendant at prices higher than the maximum prices established by Revised Maximum Price Regulation No. 169 (10 F. R. 15416), the total of such overcharges amounting to \$5,119.98.

Count II.

4. Plaintiff as Administrator of the Office of Price Administration brings this action for an injunction pursuant to the provisions of Section 205(a) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. Sections 901-946).

5. Jurisdiction of this action is conferred upon this court by Section 205(a) and (c) of the Act.

6. Defendant, at all times material hereto has sold and sells for use or consumption in the course of trade or business beef carcasses, beef wholesale cuts and bull carcasses for which maximum prices have been established under the Act.

7. (a) Defendant failed to grade beef carcasses and wholesale cuts sold by him which are derived from steers, heifers or bulls; failed to stamp sex identification on all bull carcasses and wholesale cuts sold by him; failed to indicate on seller's invoices the sex identification of each beef carcass and wholesale cut sold by him as to stag or bull and the grade of each beef carcass and wholesale cut sold by him; failed to keep records of the sales of beef carcasses and beef wholesale cuts sold by him all as re-

quired by Revised Maximum Price Regulation No. 169 (10 F. R. 15416).

(b) Defendant sold beef carcasses, beef wholesale cuts and bull carcasses at prices in excess of the maximum prices established by Revised Maximum Price Regulation No. 169 (10 F. R. 15416).

Wherefore, plaintiff demands:

I.

Judgment in favor of the Price Administrator on behalf of the United States of America and against the defendant, for three times the amount of the total [4] overcharges, to wit, for \$15,359.94.

II.

That the defendant, his agents, servants, employees, attorneys, and all persons in active concert or participation with any of them be permanently enjoined and restrained from:

(a) Selling beef carcasses and wholesale cuts without grading the same.

(b) Failing to stamp sex identification on all bull carcasses and wholesale cuts sold by him.

(c) Failing to indicate on seller's invoices the sex identification of each of beef carcass and wholesale cut sold by him as to stag or bull and the grade of each beef carcass and wholesale cut sold by him.

(d) Failing to keep records of sales of beef carcasses and beef wholesale cuts sold by him.

(e) Selling beef carcasses, beef wholesale cuts and bull carcasses at prices in excess of the maximum prices established by Revised Maximum Price Regulation No. 169.

CLARENCE E. WOHL,
By /s/ WESLEY W. WERTZ,
ALEX LEVINSKI,
Attorneys for Plaintiff,
408 Placer Hotel Bldg.
Helena, Montana.

Defendant's Address: Forsyth, Montana.

[Endorsed]: Filed Jan. 31, 1946. [5]

Thereafter, on March 15, 1946, Defendant's Consolidated Motions to Dismiss, for Separate Statement of Claims, for Definite Statement, etc., was duly filed herein, in the words and figures following, to wit:

[Title of District Court and Cause.]

DEFENDANT'S CONSOLIDATED MOTIONS
TO DISMISS, FOR SEPARATE STATE-
MENT OF CLAIMS. FOR DEFINITE
STATEMENT, ETC.

The defendant separately moves the court as follows:

I.

Separately and without waiver of any other motion herein made the defendant respectfully moves the court to dismiss the first count of the

plaintiff's complaint, and his action there for the reason that Count I of the complaint herein fails to state a claim upon which relief can be granted.

II.

Separately and without waiver of any other motion herein made the defendant respectfully moves the court to dismiss the second count of the plaintiff's complaint, and his action there for the reason that Count II of the complaint herein fails to state a claim upon which relief can be granted.

III.

Separately and without waiver of any other motion herein made the defendant respectfully moves the court to direct the plaintiff to file a more definite statement or a bill of particulars of the following matters, to which the complaint herein refers:

1. The date or dates of the sales in paragraph 3 of Count I of the complaint averred (a) to Wallin Mercantile Company, Rosebud, Montana, and (b) to Safeway Store, Number 1653, Forsyth, Montana.

2. The quantity, the unit price or the price per pound, the name of the customer, and a description of the part, cut or portion of the beef carcasses, beef wholesale cuts and bull carcasses, in each case, sold as charged in paragraph 3 of Count I of the complaint.

3. The total price charged by the defendant in the case of each sale as alleged in paragraph 3 of Count I of the complaint.

4. The ceiling price established and applicable, as the plaintiff contends, in the case of each to which paragraph 3 of Count I of the complaint refers.

5. Any amendment or amendments of Revised Maximum Price Regulation No. 169 (10 Fed. Reg. 15416) in effect, as the plaintiff claims, upon which the overcharges by him specified in Count I of his complaint are predicated.

6. The separate and specific overcharges to which the plaintiff refers in paragraph 3 of Count I of his complaint amounting in the aggregate, as he there alleges, to \$5,119.98. [8]

7. The date or dates and the place or places of the violations specified in paragraph 7(a) of Count II of the complaint, and the general nature of each transaction to which reference is there made, and upon which under Count II of the complaint aforesaid the defendant is charged.

8. The date or dates and the place or places of the sales made by the defendant as alleged in excess of established maximum prices and as in paragraph 7(b) of Count II of the complaint charged, together with the name of the customer or customers in each case, the commodity sold, the ceiling price and the price charged, all if in any case other sales are here assigned than those to which paragraph 3 of Count I of the complaint refers.

The ground of this motion is that the matters specified above are not averred with sufficient definiteness or particularly in the complaint to en-

able the defendant properly to prepare his answer forasmuch as he cannot from the face of the complaint determine sales to which reference is there made or identify the transactions upon which reliance is there had in either count, and that in consequence the defendant cannot now with certainty either admit or deny the overcharges there alleged and the violations there specified.

This motion is made and based upon the plaintiff's complaint herein, and upon each count thereof.

Dated at Billings, Montana, this 14th day of March, 1946.

ROCKWOOD BROWN,
Attorney for Defendant.

ROCKWOOD BROWN &
HORACE S. DAVIS,
FRANKLIN S. LONGAN,
By ROCKWOOD BROWN,
Attorneys for Defendant.

Suite 4,
The Montana National
Bank Bldg.,
Billings, Montana.

The defendant, Ben Arnold, in the within action here designates Suite 4, the Montana National Bank Building, Billings, Montana, and the offices at that address of his attorneys herein, Rockwood Brown & Horace S. Davis and Franklin S. Longan, as the place within the district of Montana where service in this action may be made upon him of all subsequent papers, except writs and process, and

further consents to such service in this action to be made upon him as aforesaid.

ROCKWOOD BROWN,
Attorney for Defendant.
ROCKWOOD BROWN &
HORACE S. DAVIS,
FRANKLIN S. LONGAN,
By ROCKWOOD BROWN,
Attorneys for Defendant.

[Affidavit of mailing attached.]

[Endorsed]: Filed March 15, 1946. [11]

Thereafter, on July 6, 1946, an Order Granting Motion for Substitution of Paul A. Porter for Chester Bowles as party plaintiff, was duly entered herein, as follows, to wit:

[Title of District Court and Cause.]

ORDER GRANTING MOTION FOR SUBSTITUTION OF PAUL A. PORTER FOR CHESTER A. BOWLES

For good cause appearing, it is ordered that plaintiff's motion for substitution of Paul A. Porter for Chester Bowles, as Administrator Office of Price Administration, be and is granted; and the defendant is granted ten days from receipt of notice hereof, within which to reform or modify his pending consolidated motions.

Entered in open Court at Billings, Montana, July 6, 1946. [13]

H. H. WALKER,
Clerk.

Thereafter, on July 17, 1946, Defendant's Amended Consolidated Motions to Dismiss, for Separate Statement of Claims, for Definite Statement, etc., was duly filed herein, in the words and figures following to wit:

In the District Court of the United States for
the District of Montana, Billings Division

Civil Action No. 753

PAUL A. PORTER, Administrator, Office of
Price Administration,

Plaintiff,

vs.

BEN ARNOLD,

Defendant.

DEFENDANT'S AMENDED CONSOLIDATED
MOTIONS TO DISMISS, FOR SEPARATE
STATEMENT OF CLAIMS, FOR DEFINITE
STATEMENT, ETC.

The defendant separately moves the court as follows:

I.

To dismiss the first count of the plaintiff's complaint, and his action there for the reason that Count I of the complaint herein fails to state a claim upon which relief can be granted.

II.

To dismiss the second count of the plaintiff's complaint, and his action there for the reason that Count II of the complaint herein fails to state a claim upon which relief can be granted.

III.

To dismiss the action herein, because the Emergency Price Control Act of 1942, sometimes Title 50, Sections 901-946, United States Code, under which the action herein is brought, expired with June 30, 1946.

IV.

To dismiss the action herein, because Revised Maximum Price Regulation 169 (10 F. R. 15416) heretofore promulgated under the Emergency Price Control Act of 1942 expired for all purposes with June 30, 1946, and is no longer in force or effect.

V.

To dismiss the first count of the action herein, because for the purposes of this count the Emergency Price Control Act of 1942, as amended, sometimes Title 50, Sections 901-946, United States Code, and Revised Maximum Price Regulation 169 (10 F. R. 15416) promulgated thereunder expired for all the purposes of this count with June 30, 1946.

VI.

To dismiss the second count of the action herein, because for the purposes of this count the Emergency Price Control Act of 1942, as amended, sometimes Title 50, Sections 901-946, United States Code, and Revised Maximum Price Regulation 169 (10 F. R. 15416) promulgated thereunder expired for all the purposes of this count with June 30, 1946.

VII.

To dismiss the action herein, because the plaintiff is now without capacity to sue.

VIII.

To dismiss the first count of the action herein, because the plaintiff is now without capacity to sue for recovery on this count.

IX.

To dismiss the second count of the action herein, because the plaintiff is now without capacity to sue for the recovery on this count.

X.

To dismiss the action herein, because the office of the plaintiff as price administrator under the Emergency Price Control Act of 1942, as amended, terminated in the premises with the expiration of the said act on June 30, 1946.

XI.

To dismiss the action herein, because the plaintiff is not now the administrator of the office of Price Administration, and is accordingly without authority in law to bring or maintain this action.

Or in the alternative:

XII.

To direct the plaintiff to file a more definite statement or a bill of particulars of the following matters, to which the complaint herein refers:

1. The date or dates of the sales in paragraph 3 of Count I of the complaint averred (a) to Wallin Mercantile Company, Rosebud, Montana, and (b) to Safeway Store, Number 1653, Forsyth, Montana.

2. The quantity, the unit price or the price per pound, the name of the customer, and a description of the part, cut or portion of the beef carcasses, beef wholesale cuts and bull carcasses, each case, sold as charged in paragraph 3 of Count I of the complaint. [17]

3. The total price charged by the defendant in the case of each sale as alleged in paragraph 3 of Count I of the complaint.

4. The ceiling price established and applicable, as the plaintiff contends, in the case of each sale to which paragraph 3 of Count I of the complaint refers.

5. Any amendments or amendment of Revised Maximum Price Regulation No. 169 (10 Fed. Reg. 15416) in effect, as the plaintiff claims, upon which the overcharges by him specified in Count I of his complaints are predicated.

6. The separate and specific overcharges to which the plaintiff refers in paragraph 3 of Count I of his complaint amounting in the aggregate, as he there alleges, to \$5,119.98.

7. The particular computations by which the plaintiff fixes the maximum ceiling prices applicable to the sales upon which the charges of violation in counts one and two are based, including specifically the basic maximum price or prices used, the freight differential, and any additional packing and local delivery charges.

8. The date or dates and the place or places of the violation specified in paragraph 7(a) of Count II of the complaint, and the general nature of each transaction to which reference is there made, and upon which under Count II of the complaint aforesaid the defendant is charged.

9. The date or dates and the place or places [18] of the sales made by the defendant as alleged in excess of established maximum prices and as in paragraph 7(b) of Count II of the complaint charged, together with the name of the customer or customers in each case, the commodity sold, the ceiling price and the price charged, all if in any case other sales are here assigned than those to which paragraph 3 of Count I of the complaint refers.

The ground of this motion is that the matters specified above are not averred with sufficient definiteness or particularity in the complaint to enable the defendant properly to prepare his answer forasmuch as he cannot from the face of the complaint determine the sales to which reference is there made or identify the transaction upon which reliance is there had in either count, or compute the alleged overcharges as averred, or determine the plaintiff's computations in connection therewith in making his allegation of violation by the defendant, and that in consequence the defendant cannot now with certainty either admit or deny the overcharges there alleged and the violations there specified.

This motion is made and based upon the plaintiff's complaint herein, and upon each count thereof.

Dated at Billings, Montana, this 16th day of July, 1946.

HORACE S. DAVIS,
Attorney for Defendant.

ROCKWOOD BROWN &
HORACE S. DAVIS,
FRANKLIN S. LONGAN,
By HORACE S. DAVIS,
Attorneys for Defendant.

Suite 4,
The Montana National
Bank Bldg.,
Billings, Montana.

[Affidavit of mailing attached.]

[Endorsed]: Filed July 17, 1946. [20]

Thereafter, on July 27, 1947, Motion for Substitution of Party Plaintiff was duly filed herein, in the words and figures following, to wit:

[Title of District Court and Cause.]

MOTION FOR SUBSTITUTION OF
PARTY PLAINTIFF

The petition of the United States Attorney respectfully shows:

1. That by Executive Order Number 9842 all OPA treble damage actions were transferred from the Office of Temporary Controls to the

Department of Justice, and by said order the Attorney General was ordered to coordinate, conduct, initiate, maintain or defend all OPA civil litigation from and after June 1, 1947, in the name of the United States, or otherwise as permitted by law.

2. By said Executive Order Philip B. Fleming ceased to hold office as Price Administrator, Office of Temporary Controls, and there is a need for a substitution of party plaintiff.
3. That there is a substantial need for continuing and maintaining this action.

Wherefore, petitioner prays that the United States of America be substituted as plaintiff herein in the place and stead of Paul A. Porter, Administrator, Office of Price Administration, who was succeeded by Philip B. Fleming as Administrator, Office of Temporary Controls.

JOHN B. TANSIL,

Attorney of the United States, in and for the
District of Montana.

FRANKLIN A. LAMB,

Assistant Attorney of the United States, in and for
the District of Montana.

[Endorsed]: Filed June 27, 1947. [23]

Thereafter, on June 27, 1947, Affidavit in Support of Plaintiff's Motion for Substitution of Party Plaintiff was duly filed herein, in the words and figures following, to wit:

[Title of District Court and Cause.]

AFFIDAVIT

State of Montana,
County of Yellowstone—ss.

Franklin A. Lamb, being first duly sworn deposes and says:

That he is one of the attorneys for the plaintiff in the above entitled action; that on May 6, 1947, the office of the United States Attorney in and for the District of Montana received a copy of Executive Order Number 9842, in words and figures as follows:

Executive Order No. 9842

Conduct of Certain Litigation arising Under Wartime Legislation

By virtue of the authority vested in me by the Constitution and statutes, including Title 1 of the First War Powers Act, 1941, and as President of the United States, and having regard to the established responsibilities and powers of the Department of Justice and of the Attorney General under the statutes of the United States, it is hereby ordered, in the interest of the internal management of the Government as follows:

1. The Attorney General is authorized and directed, in the name of the United States or other-

wise as permitted by law, to coordinate, conduct, initiate, maintain or defend:

- (a) Litigation before the Emergency Court of Appeals for and on behalf of the Secretary of Agriculture, the Secretary of Commerce, and the Reconstruction Finance Corporation, respectively;
- (b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control;
- (c) Litigation arising out of Directive 41, as amended, of the Office of Economic Stabilization pertaining to the withholding of subsidies because of non-compliance with or violations of control orders.

2. Nothing herein shall be deemed to restrict or limit the powers conferred upon the Attorney General by law with respect to the conduct, settlement, disposition or review of litigation.

3. The functions and duties of the Attorney General under this order shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Justice as he may designate, and there shall be made available to the Attorney General, pursuant to the provisions of Executive Order No. 9784 of September 25, 1946, any files or records pertinent to the subject matter hereof.

4. This order shall become effective June 1, 1947.

/s/ HARRY S. TRUMAN

The White House

April 23, 1947

(12 Fed. Reg. 2646 - April 25, 1947)

That the cause of action forming the basis of the complaint herein is one to recover damages "on behalf of the United States," (Section 205(e) of the Emergency Price Control Act of 1942, as amended). This action is in no sense personal to the Administrator as he was merely authorized to bring the action "on behalf of the United States" into whose treasury will go the proceeds of any judgment collected as a result of this action.

That the fact that Paul A. Porter was replaced as the Administrator of the Office of Price Administration, and that the action has been transferred to the Department of Justice for completion has no effect upon the merits of said cause. That the Executive Order referred to and quoted above demonstrates the necessity and intention to continue all pending cases under the Emergency Price Control Act of 1942, as amended.

FRANKLIN A. LAMB,
Assistant Attorney of the United States, in and for
the District of Montana.

Subscribed and sworn to before me this 26th day
of June, 1947.

[Seal] DALE F. GALLES,
Notary Public for the State of Montana Residing
at Billings, Montana.

My commission expires 4-15-49.

[Endorsed]: Filed June 27, 1947. [27]

Thereafter, on July 10, 1947, Defendant's Objections to Motion for Substitution of Party Plaintiff was duly filed herein, in the words and figures following, to wit:

[Title of District Court and Cause.]

OBJECTIONS TO MOTION FOR SUBSTITUTION OF PARTY PLAINTIFF

The defendant respectfully objects to the motion or petition herein for the substitution of the United States of America as party plaintiff in this action, and thereunto respectfully shows to the Court as follows, to wit:

1. The action herein has abated and may not now be revived or continued, because

(a) On July 6, 1946, by the order of this Court that day entered Paul A. Porter, Administrator, Office of Price Administration, was substituted as party plaintiff for Chester Bowles, Administrator, etc.

(b) On December 12, 1946, Paul A. Porter, Administrator, etc. ceased to hold the Office of Price Administrator, Office of Price Administration, and resigned his office as an officer of the United States.

(c) On December 12, 1946, by Executive Order No. 9809 (11 F. R. 14218) of the President of the United States one Philip B. Fleming, the Administrator, Office of Temporary

Controls, was invested with all the functions of the Price Administrator, Office of Price Administration, with full power and authority to continue and maintain in his name all civil proceedings theretofore instituted by the Price Administrator.

(d) On February 3, 1947, Philip B. Fleming, Administrator, etc. filed his motion in this Court and action for substitution as party plaintiff herein. This motion was never acted upon, and [29] Mr. Fleming was never substituted as party plaintiff in this action.

(e) On June 1, 1947, the said Philip B. Fleming, Administrator, etc. ceased to hold office, and the Office of Price Administration and of the Administrator thereof was abolished by the Executive Order No. 9842 (12 F. R. 2646) of the President of the United States.

(f) On June 12, 1946, the full period of six months after Mr. Fleming took office as the successor to Mr. Porter, Administrator, etc. as aforesaid, fully expired.

(g) On June 26, 1947, or shortly thereafter, and after the full period of six months aforesaid had expired the motion herein for the substitution of the United States of America as party plaintiff was first served and filed.

2. Accordingly, the action here may not be further continued or maintained in the name of the United

States of America or otherwise within the intent and meaning of Rule 25(d), Federal Rules of Civil Procedure for want of any satisfactory showing to the Court on or before June 12, 1947, that there was a substantial need for so continuing and maintaining it.

3. Accordingly, the action here may not be further continued or maintained in the name of the United States of America or otherwise within the intent and meaning of Section 780, Title 28, United States Code, otherwise Section 11, chap. 229, Act of February 13, 1925; 43 Stat. 941, for want of any satisfactory showing to the Court on or before June 12, 1947, that there was a substantial need for so continuing and maintaining the cause.

4. There is no substantial or any need for continuing or further maintaining this action.

HORACE S. DAVIS,

Attorney for Defendant.

ROCKWOOD BROWN &

HORACE S. DAVIS,

MARION B. PORTER and

NORMAN HANSON,

By HORACE S. DAVIS,

Attorneys for Defendant,

Suite 4,

The Montana National

Bank Bldg.,

Billings, Montana.

Personal service of the within and foregoing Objections to Motion for Substitution of Party Plaintiff made and admitted, and the receipt of a true copy thereof acknowledged, this 9th day of July, 1947.

JOHN B. TANSIL,
Attorney for the United States in and for the
District of Montana.

By FRANKLIN A. LAMB,
Assistant Attorney for the United States in and
for the District of Montana.

[Endorsed]: Filed July 10, 1947.

Thereafter, on July 10, 1947, Defendant's Motion to Abate and Dismiss was duly filed herein, in the words and figures following, to wit:

[Title of District Court and Cause.]

MOTION TO ABATE AND DISMISS

The defendant respectfully moves the Court to dismiss and abate the action herein, and thereunto respectfully shows the following grounds, to wit:

1. The action herein abated on December 12, 1946, upon the resignation of the plaintiff, Paul A. Porter, Administrator, Office of Price Administration, who that day ceased to hold his office as such; and thereupon the same day, viz., on December 12, 1946, his successor, one Philip B. Fleming, the Administrator, Office of Temporary Controls, took office as Administrator, Office of Price Administration.

2. But no showing to this Court whether satisfactory or otherwise that there is a substantial need for continuing and maintaining this action by the said Philip B. Fleming, Administrator, etc., and successor in office as aforesaid, has been made or offered, and no motion thereunto has been presented, and no substitution of parties plaintiff had within six months after the said Philip B. Fleming, successor etc., took office, all of which appears with greater certainty from these facts, viz..

(a) On July 6, 1946, by the order of this Court that day entered Paul A. Porter, Administrator, Office of Price Administration, was substituted as party plaintiff for Chester Bowles, Administrator, etc.

(b) On December 12, 1946, Paul A. Porter, Administrator, etc. ceased to hold the Office of Price Administrator, Office of Price Administration, and resigned his office as an officer of the United States.

(c) On December 12, 1946, by Executive Order No. 9809 (11 F. R. 14218) of the President of the United States one Philip B. Fleming, the Administrator, Office of Temporary Controls, was invested with all the functions of the Price Administrator, Office of Price Administration, with full power and authority to continue and maintain in his name all civil proceedings theretofore instituted by the Price Administrator.

(d) On February 3, 1947, Philip B. Fleming, Administrator, etc. filed his motion in this Court and action for substitution as party plaintiff herein. This motion was never acted upon, and Mr. Fleming was never substituted as party plaintiff in this action.

(e) On June 1, 1947, the said Philip B. Fleming, Administrator, etc. ceased to hold office, and the Office of Price Administration and of the Administrator thereof was abolished by the Executive Order No. 9842 (12 F. R. 2646) of the President of the United States.

(f) On June 12, 1946, the full period of six months after Mr. Fleming took office as the successor to Mr. Porter, Administrator, etc. as aforesaid, fully expired.

3. Accordingly, the action here may not be in any case revived and further continued or maintained for failure to comply with Rule 25(d), Federal Rules of Civil Procedure.

4. Accordingly, the action here may not be in any case revived and further continued or maintained for failure to comply with Section 780, Title 28, United States Code, otherwise Section 11, chap. 229, Act of February 13, 1925; 43 Stat. 941. [34]

5. Accordingly, the action here may not be revived and further continued or maintained for want of any person at this date the successor in office of the said Paul A. Porter, Administrator, etc., plaintiff herein, to be substituted in any case now as party plaintiff in this action and within the

intent and meanng of Rule 25(d), Federal Rules of Civil Procedure and Section 780, Title 28, United States Code, each aforesaid.

This motion is made and based upon the complaint in this action and upon all the papers, files, proceedings and minute entries therein, and upon the whole record in the cause heretofore had and made.

HORACE S. DAVIS,

Attorney for Defendant.

ROCKWOOD BROWN &

HORACE S. DAVIS,

MARION B. PORTER and

NORMAN HANSON,

By HORACE S. DAVIS,

Attorneys for Defendants,

Suite 4,

The Montana National

Bank Bldg.,

Billings, Montana.

Personal service of the within and foregoing Motion to Abate and Dismiss made and admitted, and the receipt of a true copy thereof acknowledged, this 9th day of July, 1947.

JOHN B. TANSIL,

Attorney for the United States in and for the District of Montana.

By FRANKLIN A. LAMB,

Assistant Attorney for the United States in and for the District of Montana.

[Endorsed]: Filed July 10, 1947. [35]

Thereafter, on November 25, 1947, Decision and Order Granting Motion to Abate and Dismiss, was duly filed herein, in the words and figures following, to wit:

In the District Court of the United States in and
for the District of Montana, Billings Division

Civil Action No. 753

PAUL A. PORTER, Administrator,
Office of Price Administration,

Plaintiff,

vs.

BEN ARNOLD,

Defendant.

DECISION AND ORDER GRANTING MOTION TO ABATE AND DISMISS

Herein the plaintiff moves for substitution of party plaintiff; the defendant opposes the same and moves to abate dismiss the action. Under certain circumstances an action abates and should be dismissed, and this appears to be such an action.

Chester Bowles, then administrator of O. P. A. brought an action against the defendant for treble damages under the Emergency Control Act of 1942; this action was commenced January 31st, 1946; thereafter Mr. Bowles resigned, as such administrator, and on July 6th, 1946, Paul A. Porter was substituted as party plaintiff. On December 12, 1946, Mr. Porter resigned, and on that date Philip B. Fleming became his successor, but has never been substituted as party plaintiff herein, and the

six month period, after Mr. Fleming took office expired on June 12th, 1947, without any substitution of a party plaintiff having been made.

Counsel for the Government, on or about June 26th, 1947, filed a motion to substitute the United States as party plaintiff in this action, which was submitted for decision under Rule 40 (2) of said court.

Counsel for defendant claims that this action may not now be maintained, but must be dismissed, because more than six months have elapsed after Mr. Porter ceased to hold office [37] as administrator of O.P.A. without substitution of his successor, and cites as authority for his contention Sec. 780, Title 28, U. S. C. A., and Rule 25 (d), Federal Rules of Civil Procedure; also *Fix. v. Philadelphia Barge Co.*, 290 U. S. 530.

Many authorities have been cited by counsel for the respective parties which the court has considered. Counsel for defendant especially emphasizes the point that the pending action should be distinguished from the cause or right of action, and good authority is referred to as a basis for his contention. The court has noted the arguments of counsel on the question of time and applicability of the statute and rule cited.

The Government counsel filed motion for substitution of party plaintiff, presumably under Sec. 780, Title 28, U. S. C. A. and Rule 25 (d), and in the court's opinion are governed by both the statute and rule, and while there is a slight variance in the language of the statute with the rule, the

result would be the same under the facts shown to exist in this case. Mr. Porter resigned December 12, 1946, and on that date Mr. Fleming became his successor, but the latter was never substituted as plaintiff in this action, nor was any application ever made to the court for the substitution of a party plaintiff to succeed Mr. Porter until more than six months after his successor took office.

After a consideration of the briefs of counsel and the authorities relied upon, the court believes that the motion to abate the action and dismiss the case without prejudice should be granted, and such is the order herein, with exception allowed counsel for the United States.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Nov. 25, 1947. [38]

Thereafter, on November 28, 1947, an Order Dismissing Plaintiff's Complaint and Action, was duly filed and entered, being as follows, to wit: [39]

[Title of District Court and Cause.]

ORDER

The defendant's motion to abate and dismiss the action herein having been previously argued by counsel upon written briefs; and the motion of the defendant having been by the court heretofore, to wit, on November 25, 1947, granted; and good cause therefore being made to appear,

Now, Therefore, the complaint of the plaintiff and the action here are, and they are each and both, hereby dismissed.

Done and dated this 28th day of Nov., 1947.

By the Court:

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed, entered and noted in Civil Docket Nov. 28, 1947. [40]

Thereafter, on February 21, 1948, a Notice of Appeal to the Circuit Court of Appeals was duly filed herein, in the words and figures following, to wit: [41]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice Is Hereby Given that United States of America hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order denying motion to substitute United States of America as plaintiff and granting defendant's motion to dismiss entered in this action on November 25, 1947.

JOHN B. TANSIL,
Attorney of the United States, in and for the District of Montana.

FRANKLIN A. LAMB,
Assistant Attorney of the United States, in and for the District of Montana.

[Endorsed]: Filed Feb. 21, 1947. [42]

Thereafter, on March 9, 1948, Plaintiff's Designation of Contents of Record on Appeal was duly filed herein, in the words and figures following, to wit [43]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Comes Now the plaintiff, and designates the portions of the record in the United States District Court to be contained in the record on appeal as follows:

The complaint on file herein; the defendant's consolidated Motion to Dismiss filed March 15, 1946; the Order granting Motion to Substitute Paul A. Porter for Chester Bowles, filed July 6, 1946; defendant's amended consolidated Motions to Dismiss filed July 17, 1946; plaintiff's Motion for Substitution of Party Plaintiff filed June 27, 1947; Affidavit in support of plaintiff's Motion filed June 27, 1947; defendant's objections to Motion for Substitution of Party Plaintiff filed July 10, 1947; defendant's Motion to Abate and Dismiss filed July 10, 1947; Decision and Order granting Motion to Abate and Dismiss filed November 25, 1947; Order dismissing plaintiff's complaint and the above-entitled action filed November 28, 1947; the Notice of Appeal; this

Designation; plaintiff's and appellant's Statement of Points.

JOHN B. TANSIL,
United States Attorney in and for the District of
Montana.

FRANKLIN A. LAMB,
Assistant United States Attorney in and for the
District of Montana.

[Endorsed]: Filed March 8, 1948. [44]

Service of the foregoing Designation admitted,
and receipt of a copy thereof acknowledged this 6th
day of March, 1948.

ROCKWOOD BROWN &
HORACE S. DAVIS,
MARION B. PORTER &
NORMAN HANSON,
By /s/ HORACE S. DAVIS,
Attorneys for Defendant. [45]

Thereafter, on March 9, 1948, a Stipulation as to
the Record was duly filed herein, in the words and
figures following, to wit: [46]

STIPULATION AS TO THE RECORD

It Is Hereby Stipulated and Agreed that the record on appeal shall consist of the papers and documents referred to in the Designation of the plaintiff and appellant filed herein.

Dated this 6th day of March, 1948.

JOHN B. TANSIL,
United States Attorney in and for the District of
Montana,

/s/ FRANKLIN A. LAMB,
Assistant United States Attorney in and for the
District of Montana,

Attorneys for Plaintiff
and Appellant.

ROCKWOOD BROWN &
HORACE S. DAVIS,
MARION B. PORTER &
NORMAN HANSON,
By /s/ HORACE S. DAVIS,
Attorneys for Defendant.

[Endorsed]: Filed March 9, 1948. [47]

Thereafter, on March 9, 1948, Statement of
Points of Appellant was duly filed herein, in the
words and figures following, to wit: [48]

[Title of District Court and Cause.]

STATEMENT OF POINTS OF APPELLANT

Comes Now the plaintiff and appellant and makes
the following statement of points upon which it in-
tends to rely on the appeal:

1. The defendant's Motion to Abate and Dismiss
upon the ground that the same fails to state
a legal reason upon which the action might be
'abated or dismissed.

2. The objections to plaintiff's and appellant's Motion for Substitution of Party Plaintiff upon the ground that it fails to state a legal reason why said motion should not be granted.
3. The Court erred in its decision dated November 25, 1947, granting defendant's Motion to Abate the action and dismiss the case, since it appears that neither Section 780, Title 28, U.S.C.A., nor Rule 25(b), Federal Rules of Civil Procedure were properly interpreted and applied by the Court in its decision.
4. The Court erred in its Order dated November 28, 1947, dismissing plaintiff's complaint and the above-entitled action, as the same was not properly based in law.

JOHN B. TANSIL,

United States Attorney in and for the District of Montana,

/s/ FRANKLIN A. LAMB,

Assistant United States Attorney in and for the District of Montana,

Attorneys for Plaintiff
and Appellant. [49]

Service of the Foregoing Statement of Points admitted, and receipt of a copy thereof acknowledged this 6th day of March, 1948.

ROCKWOOD BROWN &
HORACE S. DAVIS,
MARION B. PORTER &
NORMAN HANSON,

By HORACE S. DAVIS,

Attorneys for Defendant.

[Endorsed]: Filed March 9, 1948. [50]

In the District Court of the United States in and
for the District of Montana

United States of America,
District of Montana—ss.

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 51 pages, numbered consecutively from 1 to 51 inclusive, constitutes a full, true and correct transcript of all portions of the record in case number 753, Chester Bowles, Administrator, Office of Price Administration, versus Ben Arnold, designated by the parties as the record on appeal thereon, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Seventeen and no/100 Dollars (\$17.00), and have been made a charge against the United States of America, appellant.

Witness my hand and the seal of said Court at Great Falls, Montana, this 10th day of March, A. D. 1948.

[Seal] H. H. WALKER,
Clerk, United States District Court, for the District
of Montana.

By /s/ C. G. KEGEL,
Deputy Clerk. [51]

[Endorsed]: No. 11884. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Ben Arnold, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed March 15, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11885

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE TUG "ROCONA," JOHNSON WESTERN
COMPANY and CASE CONNOLLY COMPANY,
Appellants,

vs.

GUY F. ATKINSON COMPANY,
Appellee.

APOSTLES ON APPEAL

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

FILED

MAY 17 1948

PAUL P. O'BRIEN,
CLERK

No. 11885

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

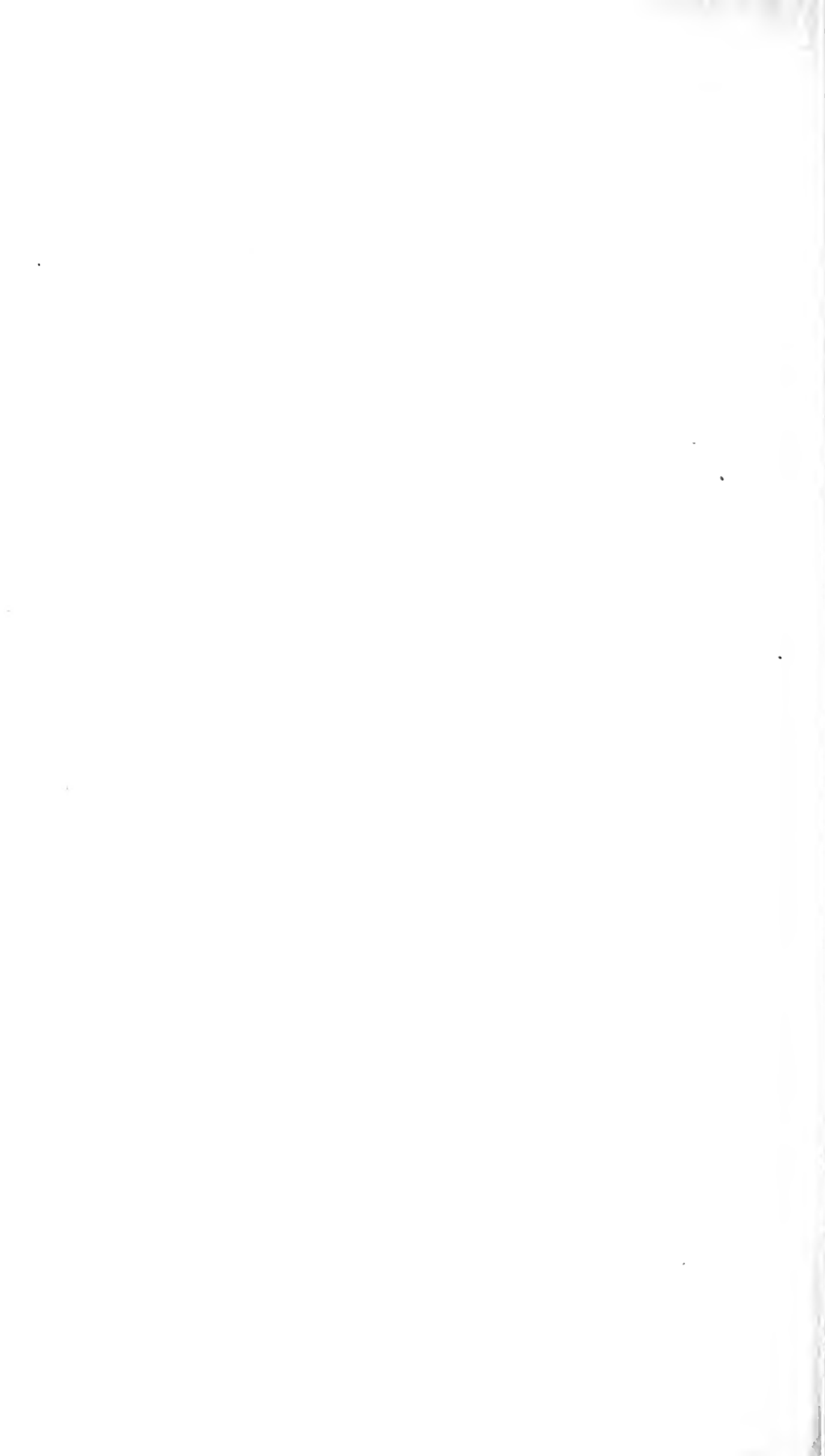
THE TUG "ROCONA," JOHNSON WESTERN
COMPANY and CASE CONNOLLY COMPANY,
Appellants,

vs.

GUY F. ATKINSON COMPANY,
Appellee.

APOSTLES ON APPEAL

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS:

For Appellants:

HILL, MORGAN & FARRER

WILLIAM S. SCULLY

1007 Title Guarantee Building,

411 West Fifth Street

Los Angeles 13, Calif.

For Appellee:

McCUTCHEN, THOMAS, MATTHEW,

GRIFFITHS & GREENE

HAROLD A. BLACK

GEORGE E. TONER

704 Roosevelt Building

Los Angeles 14, Calif. [1*]

NAMES AND ADDRESSES OF PROCTORS:

For Appellants:

HILL, MORGAN & FARRER

WILLIAM S. SCULLY

1007 Title Guarantee Building,

411 West Fifth Street

Los Angeles 13, Calif.

For Appellee:

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE

HAROLD A. BLACK

GEORGE E. TONER

704 Roosevelt Building

Los Angeles 14, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

In the United States District Court
Southern District of California
Central Division

In Admiralty No. 6936-B

GUY F. ATKINSON COMPANY, a corporation,
Libelant,

vs.

The Tug ROCONA, Her Engines, Tackle, Apparel and
Furniture, JOHNSON WESTERN COMPANY, a
corporation,

Respondents,

and

CASE CONNOLLY COMPANY, a corporation,
Claimant.

CITATION ON APPEAL

To Guy F. Atkinson Company, a Corporation, and
Messrs. McCutchen, Thomas, Matthew, Griffiths and
Greene, Harold A. Black, and George E. Toner,
Esquires, Its Attorneys, Greetings:

You are hereby cited and admonished to be and appear
at a United States Circuit Court of Appeals for the Ninth
Circuit, to be held at the City of San Francisco, in the
State of California, on the 29 day of March, 1948, pur-
suant to an Order Allowing Appeal, filed on February 18,
1948, in the Clerk's Office of the District Court of the
United States, in and for the Southern District of Cali-
fornia, Central Division, in that certain cause numbered

Admiralty No. 6936-B, wherein the Tug Rocona, etc., Johnson Western Company, [2] a corporation, and Case Connolly Company, a corporation, are appellants, and you are appellee, to show cause, if any there be, why the Interlocutory Decree and Order of Reference in the said appeal mentioned, should not be reversed and vacated, and why you should not do and receive what may appertain to justice in the premises.

Witness, the Honorable Paul J. McCormick, United States District Judge for the Southern District of California, this 20th day of February, 1948, and of the Independence of the United States, the 172nd.

PAUL J. McCORMICK

United States District Judge for the Southern
District of California

Service of a copy of the foregoing Citation on Appeal is acknowledged this 19th day of February, 1948, together with copy each of: Petition for Appeal, Assignment of Errors, and Order Allowing Appeal. McCutchen, Thomas, Matthew, Griffiths and Greene, Harold A. Black, George E. Toner, by Harold A. Black, Proctors for Libelant.

[Endorsed]: Filed Feb. 20, 1948. Edmund L. Smith, Clerk. [3]

by virtue of the terms of said contract, the Case Construction Company agreed to tow said Barge from Catalina Island to Los Angeles Harbor in an efficient and careful manner, to moor said barge at one of several mooring floats at said harbor or to transfer said barge to a harbor tug.

V.

Pursuant to the terms of said contract, on March 31, 1945, libelant delivered said Barge No. 4414 to said Tug Rocona at Catalina Island, said barge then and there being in a sound and seaworthy condition and loaded with 879 tons of rock. Said Case Construction Company, by its employees, agents and servants, acting within the scope of their employment took sole possession, charge, custody and control of said barge and caused the respondent Tug Rocona to be put in tow thereof. On April 1, 1945, said Barge No. 4414 was redelivered to libelant at a mooring float in Los Angeles Harbor in a sinking and unseaworthy condition; a large hole had been punched in her bottom approximately 20 feet aft of the bow rake and about 5 feet from the starboard side; more specifically as was subsequently discovered, planks numbers 22 and 23 from the bow rake were stove in, and said barge was taking water faster than could be handled by her pumps. To prevent said barge from sinking then and there with its load of rock, libelant was compelled to and did cause said barge to be towed about the harbor in order to discharge said load of stone overboard.

VI.

The reasonable cost of repairs, necessary to restore said Barge No. 4414 to a seaworthy condition, amounted to \$2,308.62. Repairs [6] consisted of replacing the planks numbers 22 and 23 to approved butts, together with the

necessary caulking and painting. As a result of said delivery of said Barge No. 4414, in an unseaworthy and sinking condition, libelant sustained a loss of 808.86 tons of rock to a value of \$1,455.95. In order to prevent said barge from sinking with its entire load of rock, libelant was compelled to and did expend the sum of \$177.03 for tug hire. As a proximate result of said repairs said barge was detained and unable to engage in her usual service for a period of four days, as a result of which detention time libelant suffered a loss of \$133.33. As a further result of said damage, libelant was required to expend the sum of \$80.00 for surveyor's fee; libelant has accordingly suffered a total loss as a direct and proximate result of said delivery by respondent tug of said Barge No. 4414 in a damaged, sinking and unseaworthy condition, of \$4,154.93, in which amount libelant prays reparation with interest.

VII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

As a Further, Separate, Distinct and Second Cause of Action, libelant alleges:

VIII.

Libelant repeats, reiterates and incorporates by reference as if fully set forth herein, Articles numbered I, II, III and IV of this answer.

IX.

Under and by virtue of said contract, respondent Tug ROCONA and the employees, agents and servants of said Case Construction Company, had a duty to use due care and caution in the towage and [7] mooring of said Barge

No. 4414, and to exercise due and proper seamanship in the towing and mooring of said Barge No. 4414.

X.

Libelant repeats, reiterates and incorporates by reference as if fully set forth herein, Articles numbered V and VI of this answer.

XI.

Said employees, agents and servants of Case Construction Company and respondent Tug Rocona were negligent and careless in that said towing and mooring of said barge were conducted in an improper, careless and improvident manner in that said barge upon being moored was allowed to override and run above the same mooring float when the mooring pendant of said float was affixed to the mooring bitt of the barge. When the forward motion of the barge caused the mooring line and the anchor chain of the float to become taut, the mooring float overturned below the said barge and a "U" bolt located at approximately the center of the mooring float was punched through the bottom of the barge. Said employees of the Case Construction Company and said respondent tug Rocona were negligent in that:

- (1) Said vessel was not in charge of competent persons;
- (2) Said persons did not have proper or efficient officers or crew properly stationed and attending to their duties;
- (3) Said vessel was negligently and carelessly maneuvered so as to cause the bow of the said Barge No. 4414 to override the said mooring float;
- (4) The forward motion of said Barge No. 4414 was not stopped before the bow of said barge came up to said mooring float;

- (5) They were negligent in other and further particulars than those hereinbefore set forth, of which libelant is not at present advised but as to which libelant begs leave [8] to offer proof as and when advised and to amend this libel accordingly.

As a direct and proximate result of said negligence and carelessness of said respondent, Tug Rocona and the employees, servants and agents of Case Construction Company and said Tug Rocona, libelant has been damaged in the sum of \$4,154.93 for which sum libelant prays reparation with interest.

Wherefore Libelant Prays that process in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against said Tug Rocona, her engines, tackle, apparel and furniture, etc., and that all persons having any interest therein may be cited to appear and answer upon oath all and singular the matters aforesaid; that this court will hear the evidence which the libelant will adduce in support of the allegations of the libel and will enter a decree in favor of the libelant for the above-mentioned damages and will order the same to be paid and satisfied out of the said proceeds of the Tug Rocona, together with interest and with the costs of the libelant and will otherwise right and justice administer in the premises.

Dated May 4, 1947.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE
HAROLD A. BLACK
GEORGE E. TONER [9]

[Verified.]

[Endorsed]: Filed May 6, 1947. Edmund L. Smith,
Clerk. [10]

In the United States District Court
Southern District of California
Central Division

In Admiralty No. 6936-B

GUY F. ATKINSON COMPANY, a corporation,
Libelant,

vs.

The Tug ROCONA, Her Engines, Tackle, Apparel and
Furniture, JOHNSON WESTERN COMPANY, a
corporation,

Respondents,

and

CASE CONNOLLY COMPANY, a corporation,
Claimant.

ANSWER TO LIBEL

Come now the respondent, Johnson Western Company, a corporation, answering for itself, and the claimant herein, Case Connolly Company, a corporation, answering on behalf of the Tug "Rocona," her engines, tackle, apparel and furniture, and admit, deny and allege:

I.

Admit the allegations set forth in paragraph I of the libel on file herein.

II.

Allege that they or either of them do not have sufficient [11] information or belief to enable them to answer the allegations contained in paragraph II of said libel, and basing their denial on said lack of information and belief, deny generally and specifically, each and every, the allegations contained in said paragraph II, except that

these answering parties admit that Barge No. 4414 was hauling rock from Catalina Island to Los Angeles Harbor at the time of the occurrence alleged in said libel.

III.

Answering the allegations contained in paragraph III of said libel, deny generally and specifically that at the time of the occurrence of the event on which said libel is based, or at any other time, or at all, the Tug "Rocona" was owned by the Case Construction Company, a co-partnership, and further deny generally and specifically that Case Construction Company, a co-partnership has or did at any time, or at all, transfer or purport to transfer the said Tug "Rocona" to respondent, Johnson Western Company, a corporation, and in the foregoing connection these answering parties allege that the Tug "Rocona" is now and was at all times herein mentioned, and at all times referred to in said libel, and particularly on April 1, 1945, owned by the claimant, Case Connolly Company, a corporation; however, said Tug "Rocona" was during March and April 1945, and specifically at the time of the alleged occurrences referred to in said libel, operated and managed by Case Construction Company, a co-partnership. The balance of the allegations contained in paragraph III of said libel not hereinabove specifically denied in this paragraph of this Answer, are admitted.

IV.

Admit the allegations contained in paragraph IV of said libel, and allege that Case Construction Company properly, efficiently, in a careful manner and in full compliance with its engagement, safely towed and safely moored Barge No. 4414. [12]

V.

Deny generally and specifically, each and every, the allegations contained in paragraph V of said libel, and allege that the facts and circumstances of the occurrences of March 31 and April 1, 1945 as purported and attempted to be alleged in paragraph V of said libel are incorrect and untrue, and that the true facts and circumstances are as follows, to wit:

On March 31, 1945 at Catalina Island, California, libelant, through its authorized agents and employees, delivered Barge No. 4414 fully loaded with rock to the Tug "Rocona" for the purpose of towing said barge to Los Angeles Harbor. Said barge had been loaded previously with said rock, by libelant, in an improper and unsafe manner and when said barge was delivered to the Tug "Rocona" for said towing purposes it was not in a safe, sound, or seaworthy condition in that it was heavy by the stern with approximately two to three feet of freeboard at the bow, and six to eight inches of freeboard at the stern. Nevertheless, the Tug "Rocona," through her master, undertook to and did tow Barge No. 4414 from Catalina Island, California to Los Angeles, California without untoward event. At about the hour of 12:00 midnight, March 31-April 1, 1945 the Tug "Rocona," through her master and crew, caused said Barge No. 4414 to be moored at Los Angeles Harbor, California, in a safe, proper and seamanlike manner to a certain mooring block or float provided by and the property of the libelant. Having completed her towing engagement safely and properly and having moored the tow (said Barge No. 4414) said Tug "Rocona" departed. At the time of and during the mooring of said barge to the mooring facility provided for the purpose by libelant, said

mooring facility appeared proper, safe and useful for its intended purpose. At a time precisely unknown to these answering parties, but subsequent to the completion of the mooring of said barge as aforesaid, certain damage occurred to the bottom of said Barge No. 4414, in that planks Nos. 22 and 23 were stove in at a point [13] approximately 20 feet aft of the forward rake, and approximately five feet inboard from the starboard side. These answering parties are informed and believe, and upon such information and belief allege that the cause of said injury as aforesaid to Barge No. 4414 was caused and occurred by virtue of the ebb and flow, rise and fall of the sea lifting or impelling the said Barge No. 4414 up, over and upon the "U" bolt affixed to and part and parcel of the said mooring facility. Said mooring facility was anchored to the floor of Los Angeles Harbor by an anchor chain that was too short, and by reason of that condition the floating portion of said mooring was, at times of high or medium tide, submerged or partially submerged, thus making it inevitable that a heavy laden craft moored thereto would during time of high or medium tide be hoisted or impelled upon and over and on top of the floating portion of said mooring.

VI.

Answering the allegations contained in paragraph VI of said libel, these answering parties allege that they or either of them do not have sufficient information or belief with which to answer the allegations contained in said paragraph VI, and basing their denial on said lack of information and belief, deny generally and specifically, each and every, the allegations contained in said paragraph VI.

VII.

Deny generally and specifically, each and every, the allegations contained in paragraph VII of said libel, except that these answering parties admit the jurisdiction in Admiralty and Maritime matters of this Honorable Court.

For Answer to Libelant's Further, Separate, Distinct and Second Cause of Action, these Answering Parties Admit, Deny and Allege: [14]

I.

Answering the paragraphs of said libel incorporated in said alleged second cause of action by paragraphs VIII and X of said libel these answering parties repeat, reiterate and incorporate herein by reference, the same as though specifically set forth, paragraphs I, II, III, IV, V and VI of this their answer to said libel.

II.

Admit the allegations set forth and contained in paragraph IX of said libel, and in that connection allege that Case Construction Company, its agents, employees and servants, and the Tug "Rocona," her master and crew, in every respect did use due and proper care and caution both in the towing and the mooring of said Barge No. 4414, and they and each of them did use, exercise and perform due and proper seamanship in same.

III.

Deny generally and specifically, each and every, the allegations contained and set forth in paragraph XI of said libel.

As and for a First, Separate and Distinct Defense to Said Libel, These Answering Parties Allege:

I.

Libelant's first alleged cause of action set forth in paragraphs I to VII, both inclusive, of said libel, do not nor do any of them, nor do any of the allegations therein contained state facts sufficient to constitute a cause of action against these answering parties, or any of them.

As and for a Second, Separate and Distinct Defense to Said Libel, These Answering Parties Allege:

I.

The facts and circumstances of the incident and occurrence referred to in said libel and in both of the alleged causes of action [15] therein set forth, together with the damage, loss or injury, if any, therein complained of, were and each of them was proximately and directly caused and contributed to by the negligence, fault and unlawful conduct of the libelant through its agents, servants and employees, with particular reference and respect to the improper manner, method and condition of loading said Barge No. 4414, and in providing, furnishing and maintaining an improper, unsafe and dangerous mooring facility, all as more specifically alleged and specified in and by the affirmative allegations hereinabove in this answer set forth, and all of which affirmative allegations are herein and hereby repeated, reiterated, realleged and incorporated herein the same as though specifically set forth herein.

Wherefore, these answering parties pray that libelant take nothing by reason of this cause, that they and each of them go hence with judgment and decree for their

necessary costs, for restitution of the vessel Tug "Rocona," and for such other and further relief as to this Honorable Court may seem meet and proper.

HILL, MORGAN & FARRER

By William S. Scully

Proctors for Respondent and Claimant.

[Verified.]

[Endorsed]: Filed Jun. 20, 1947. Edmund L. Smith,
Clerk. [16]

[Title of District Court and Cause]

PRETRIAL STIPULATION

The parties hereto, by their respective proctors, in order to shorten and simplify the trial of the above matter and to supply deficiencies in proof by any party upon factual issues concerning which evidence is not produced at the trial, do hereby make and enter into the following stipulation:

It Is Stipulated and Agreed that except as the Court may find to the contrary from evidence adduced at the trial, the following facts are true:

FACTS

1. Libellant, a corporation, was engaged in the business of constructing the Terminal Island Mole in Los Angeles Harbor; in furtherance of said operation, its Barge #4414 [17] was being used for transportation of rock from a quarry at Catalina Island to said job. Barge #4414 is an unpowered barge, 119.7 feet in length, 39.5 feet in beam, owned by libellant.

2. Respondent, Johnson Western Company, a corporation, is the successor to the rights and liabilities of the Case Construction Company, a partnership; the respondent, Tug Rocona, was at all times material to this case, a tug 65.8 feet in length, 18.2 feet in beam, powered by a 275 horsepower diesel engine, engaged in the commercial tow boat business, owned by the Case-Connolly Company, a corporation; at said times, said Tug Rocona was operated and managed by the Case Construction Company. and manned by agents, servants and employees of said Case Construction Company who were acting within the scope of their employment as such agents, servants and employees. Due and proper claim to the Tug Rocona was filed in this action by and on behalf of the Case-Connolly Company, a corporation, and said corporation is the claimant herein.

3. On March 31, 1945, said Tug Rocona was operating under a contract of hire whereby for a consideration, said tug fully maintained, manned and equipped by Case Construction Company was to tow libelant's barges from Catalina Island to Los Angeles Harbor.

4. On March 31, 1945, at approximately 1:30 P. M. pursuant to said contract, the Tug Rocona commenced to tow Barge #4414 and another barge from Catalina Island to Los Angeles Harbor. Said barge had been loaded by employees of libelant with 879 tons of rock. Respondents allege [18] and libelant denies, that said barge was negligently loaded in that it had two to three feet of freeboard at the bow and six inches to eight inches of freeboard at the stern. No employee of libelant was on either said barges or on said tug during said towing. The channel crossing was without incident.

5. At approximately 11:30 P. M. on said date said tug and said barges arrived off the harbor entrance, the

sea towing line was shortened, the other barge was turned over to the tug Dispatch #2 and the Rocona thereupon towed Barge #4414 to a certain mooring float, provided by libelant for mooring said rock barges in the outer harbor until their cargoes could be unloaded. The exact time of said mooring, as well as what occurred when the crew of the Tug Rocona moored said barge is in dispute. Libelant alleges and respondents deny that said mooring was negligently performed by said crew.

6. Respondents allege, and libelant denies, that said mooring float was negligently maintained by libelant. Said float is of wood, approximately ten feet square, about four feet in thickness. At the center of the underside of said float is a large "U" bolt of 1½ inch diameter iron which projects eight or ten inches from the surface and to which is attached an anchor chain leading to a 15 or 20 ton granite boulder which rests on the bottom. On the topside of the float, to a similar "U" bolt is attached a mooring pendant in the free end of which an eye is woven.

7. At the time of mooring said barge, the wind was [19] negligible. Ordinarily currents and surges of the outer harbor were present. The state of the tide at times material to this action was as recorded by the United States Coast and Geodetic Survey, the official records of which will be offered in evidence at the trial.

8. Subsequent to the mooring of Barge #4414, she was discovered to be listing and dumping part of her load of rock. To prevent the barge from sinking with her load of rock, 808.86 tons of rock was intentionally dumped overboard in the outerharbor by libelant. On the following day said barge was capsized and it was found that a hole approximately the size and shape of

one of the "U" bolts on the float had been punched through her bottom.

ISSUES

Libelant states the issues of fact as follows:

1. In the first cause of action (based upon an alleged liability of respondents as bailees):
 - a) Was Barge #4414 delivered to respondents in good condition and
 - b) Redelivered in the like good condition?
2. In the second cause of action (based upon alleged negligence):
 - a) Was the barge properly loaded by libelant at Catalina Island, if not is there any proximate causation between said manner of loading and the subsequent damage to said barge?
 - b) Was the said barge properly moored by respondents and if not was the damage proximately caused thereby?
 - c) Was the mooring float properly maintained by libelant and if not was the damage to the barge proximately caused thereby? [20]

The issues of law involved are:

1. In the first cause of action:
 - a) Is the legal relationship of the parties that of bailor-bailee?
 - b) Do respondents have the burden of showing that the damage to the barge was caused under circumstances in which respondents were without fault?
2. In the second cause of action:
 - a) Were respondents at fault?
 - b) Was libelant at fault?

3. The Court can find that this damage was due to
- a) Sole fault of respondents
 - b) Mutual fault
 - c) No fault of respondents. (This finding would include a finding of unavoidable accident.)

Respondent and claimant state the issues as follows:

The basic and principal issue of fact for decision by the Court is whether or not respondents are chargeable with actionable negligence under all of the facts and circumstances. Further, whether, under all of the facts and circumstances of the case libelant is chargeable with negligence proximately causing or contributing to the damages sustained by Barge #4414.

It Is Further Stipulated and Agreed that in the event of a finding of sole fault of respondents or a finding of mutual fault, that this Court may enter an Interlocutory Decree and Order of Reference to a special Master to ascertain damages sustained by libelant. In the event of a finding that respondents were without fault or that the damage was due to unavoidable accident, this Court's decree may be for dismissal of the libel. [21]

Dated at Los Angeles, California, this 12 day of December, 1947.

McCUTCHEN, THOMAS, MATTHEW,

GRIFFITHS & GREENE

HAROLD A. BLACK

GEORGE E. TONER

Proctors for Libelant

HILL, MORGAN & FARRER

WILLIAM S. SCULLY

Proctors for Respondents and Claimant

[Endorsed]: Filed Dec. 12, 1947. Edmund L. Smith,
Clerk. [22]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled case came on regularly for trial on December 16, 1947, before the Honorable Campbell E. Beaumont, United States District Judge. Messrs. McCutchen, Thomas, Matthew, Griffiths & Greene by George E. Toner, Esq. appeared for libelant and Messrs. Hill, Morgan and Farrer by William S. Scully, Esq. appeared for respondents and claimants. The case was submitted on the pleadings, oral testimony and exhibits offered in evidence in connection therewith and on oral argument of counsel. The Court having been fully advised in the premises and having delivered its [23] oral opinion, now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I.

The Court finds that libelant, at the times mentioned in the libel, owned an unpowered barge designated as Barge 4414, 119.7 feet in length, 39.5 feet in beam, used for transporting rock from Catalina Island to the Terminal Island mole in Los Angeles Harbor, in furtherance of libelant's business in the construction of said mole.

II.

The Court finds that respondent Johnson Western Company, a corporation, is the successor to the rights and liabilities of the Case Construction Company, a partnership; that at the times mentioned in said libel, the Case Construction Company, by its agents, servants and employees manned and operated respondent tugboat Ro-

cona; that claimant Case Connolly Company, a corporation, owned said respondent tugboat Rocona; that said respondent tugboat Rocona was a vessel 65.8 feet in length, 18.2 feet in beam, powered by a 275 horsepower diesel engine, engaged in the commercial towing business.

III.

The Court finds that at the times mentioned in the libel respondent tug Rocona was operating under a contract of hire whereby for a consideration, said tug fully manned, maintained and equipped by Case Construction Company was to tow and did tow libelant's barges, including Barge 4414 from Catalina Island to Los Angeles Harbor.

IV.

The Court finds that on April 1, 1945 said Barge 4414 was holed and damaged while it was being moored by respondent tug Rocona [24] at a certain mooring float in Los Angeles Harbor.

V.

The Court finds that the facts pertinent to said damage are as follows:

On March 31, 1945, at approximately 1:30 P. M., pursuant to said contract, respondent tug Rocona took Barge 4414 in tow at Catalina Island. At said time said barge was in seaworthy condition, loaded with 879 tons of rock, and that as loaded, said barge had a draft of approximately nine feet; that the gross tonnage of said barge and cargo was approximately 1200 tons.

Said barge was towed tandem with another barge across the Catalina Channel without incident. Said tug and tow arrived at the Los Angeles breakwater entrance at approximately 11:30 p. m., and entered the harbor; respondent tug Rocona thereafter delivered the other barge to the tug Dispatch for mooring, placed a crew member aboard the Barge 4414 for the purpose of mooring said barge to a mooring float provided by libelant. Said mooring float consisted of a solid wooden block approximately ten feet square by four feet thick. To the top surface of said float was affixed a large "U" bolt about ten inches high, made of 1½" iron to which was attached a mooring pendant or steel cable approximately forty feet in length into the loose end of which an eye was spliced; a chain, approximately seventy-five feet in length led from a similar "U" bolt in the under surface of the float to an anchor. Respondent tug Rocona towed said barge at a slow speed toward said float until it was within a distance of approximately 100 feet of said float when the tug's engine was shut off. The barge's momentum carried it slowly forward into and over said mooring float. Just before the forward rake of the barge passed over the float, the crew member of respondent tug Rocona who had been transferred to the barge, picked up the mooring pendant with a boathook, placed [25] it over the forward starboard Samson post of the barge, released the towing bridle and returned to the tug which had meanwhile backed down to the barge. The tug took no steps to stop the barge. The barge continued its for-

ward motion, overriding the mooring float until the mooring pendant and anchor chain became taut. As the barge was stopped, the "U" bolt of the mooring float was driven through the bottom four-inch planking of the barge, causing a hole approximately the size and shape of the "U" bolt, at a point about forty feet from the starboard forward Samson post, measured along the rake and bottom of the barge. The barge began to take water and within an hour was discovered to be in a sinking condition. A large portion of the cargo of rock was lost as the result of the partial capsizing of said barge.

VI.

The Court finds that in view of these facts the crew of respondent tug Rocona was negligent in the following respects:

- a) Respondent tug Rocona was improperly and negligently maneuvered so as to cause Barge 4414 to override the said mooring float.
- b) Respondent tug Rocona approached said float with Barge 4414 in tow at an excessive and negligent speed under the circumstances then and there prevailing.
- c) Respondent tug Rocona negligently failed to stop the forward motion of Barge 4414 upon reaching said mooring float.
- d) Respondent tug Rocona negligently and carelessly moored Barge 4414 in that during said mooring said barge was allowed to override said mooring float.
- e) Respondent tug Rocona failed to take reasonable steps to avoid causing said Barge 4414 to override the said [26] mooring float.

VII.

The Court finds that the damage to Barge 4414 was caused solely and proximately by negligence of said tug Rocona.

VIII.

The Court finds that the testimony of the witnesses of respondents and claimant that they moored said barge properly is not convincing and cannot be accepted.

IX.

The Court finds that respondent tug Rocona was solely at fault in the particulars set forth herein, and that the resulting damage to Barge 4414 and loss of its cargo was caused solely by the said negligence of said respondent tug Rocona.

X.

The Court finds that it is not true that libelant was negligent in respect to the manner, method or condition of loading of said Barge 4414 or in providing, furnishing or maintaining said mooring float or in any other respect alleged in the answer to the libel or in any other respect or at all.

XI.

The Court finds that all allegations of the answer which are inconsistent with the foregoing findings of fact are untrue.

CONCLUSIONS OF LAW

And as conclusions of law from the foregoing facts, the Court finds:

I.

That neither Barge 4414 nor said libelant or either of them committed any fault or negligence in the premises.

II.

That respondent tug Rocona was negligent and in sole fault [27] in the premises.

III.

That the damage to Barge 4414 was proximately caused solely by the negligence and fault of respondent tug Rocona.

IV.

That respondent Johnson Western Company is liable to libelant for the fault and negligence of the respondent tug Rocona.

V.

That libelant Guy F. Atkinson Company is entitled to recover from respondent tug Rocona and respondent Johnson Western Company all losses and damage sustained by said libelant in the premises as aforesaid together with interest and costs.

Dated Feb. 10, 1948.

C. E. BEAUMONT

United States District Judge

Approved as to form. Hill, Morgan & Farrer, by William S. Scully, Proctors for Respondents and Claimant.

[Endorsed]: Filed Feb. 10, 1948. Edmund L. Smith, Clerk. [28]

In the United States District Court
Southern District of California
Central Division

In Admiralty No. 6936-B

GUY F. ATKINSON COMPANY, a corporation,

Libelant,

vs.

The Tug ROCONA, Her Engines, Tackle, Apparel and
Furniture, JOHNSON WESTERN COMPANY, a
corporation,

Respondents,

and

CASE CONNOLLY COMPANY, a corporation,

Claimant.

INTERLOCUTORY DECREE AND ORDER OF
REFERENCE

By reason of the law and the findings of fact on file
herein,

It Is Hereby Ordered, Adjudged and Decreed that the
damage to Barge 4414 which occurred in Los Angeles
Harbor on April 1, 1945, referred to in the pleadings and
the findings of fact and conclusions of law herein, and
the losses and damages resulting therefrom were caused
through the sole fault of respondent tug Rocona and of
those in charge of her navigation and,

It Is Further Ordered, Adjudged and Decreed that
libelant, Guy F. Atkinson Company, do have and recover
from the respondent [29] tug Rocona and from respondent
Johnson Western Company, the full amount of the
losses and damages sustained by said libelant, together
with interest and costs; and

It Is Further Ordered, Adjudged and Decreed that this cause be and it is hereby referred to Howard V. Calverley, Esq., United States Commissioner as special master, to ascertain the damages sustained by said libelant and to make findings and report his conclusions thereon to this court with all convenient speed.

Dated this 10th day of February, 1948.

C. E. BEAUMONT

United States District Judge

Approved as to form. Hill, Morgan & Farrer, by William S. Scully, Proctors for Respondents and Claimant.

Judgment entered Feb. 10, 1948. Docketed Feb. 10, 1948. Book 48, page 453. Edmund L. Smith, Clerk; by E. M. Enstrom, Jr., Deputy.

[Endorsed]: Filed Feb. 10, 1948. Edmund L. Smith, Clerk. [30]

[Title of District Court and Cause]

NOTICE OF APPEAL

To Guy F. Atkinson Company, a corporation, Libelant, and to Messrs. McCutchen, Thomas, Matthew, Griffiths and Greene, Harold A. Black, and George E. Toner, Esquires, Its Attorneys:

You and Each of You Will Please Take Notice: The Tug Rocona, etc., and Johnson Western Company, a corporation, respondents, and Case Connolly Company, a corporation, claimant, in the above entitled cause hereby appeal to the next United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, Cali-

fornia, from the Interlocutory Decree and Order of Reference of this Court entered herein on the 10th day of February, 1948, and [31] from each and every part of said Decree.

Dated at Los Angeles, California, February 18, 1948.

HILL, MORGAN & FARRER

By William S. Scully

Proctors for Respondents and Claimant

[Endorsed]: Filed & mld. copy to Geo. E. Toner, Atty. for Libelant, Feb. 20, 1948. Edmund L. Smith, Clerk. [32]

[Title of District Court and Cause]

PETITION FOR APPEAL

To the Honorable Campbell E. Beaumont, Judge of the United States District Court, Southern District of California, Central Division:

Petitioners, the Tug Rocona, Johnson Western Company, a corporation, respondents, and Case Connolly Company, a corporation, claimant, pray that they may be permitted to take an appeal from the Interlocutory Decree and Order of Reference entered in this case on February 10, 1948, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith.

Dated at Los Angeles, California, February 16, 1948.

HILL, MORGAN & FARRER

By William S. Scully

Proctors for Respondents and Claimant

[Endorsed]: Filed Feb. 18, 1948. Edmund L. Smith, Clerk. [33]

[Title of District Court and Cause]

ORDER ALLOWING APPEAL

Upon reading the Petition for Appeal of the Tig Rocona and Johnson Western Company, Respondents, and Case Connolly Company, a corporation, Claimant, herein, for an appeal from the Interlocutory Decree and Order of Reference entered in this case on February 10, 1948, and from the whole thereof, and on consideration of the Assignment of Errors filed herewith, and upon consideration of the Stipulation re: Stay of Proceedings and Security for Costs on Appeal, and Good Cause Appearing Therefor:

It Is Ordered, that the appeal herein be allowed as prayed for, and

It Is Further Ordered, that all further proceedings in this [34] Court, including but not limited to the reference to Howard V. Calverley, Esquire, United States Commissioner and Special Master, ordered by the Interlocutory Decree and Order for such reference, be and they are hereby stayed pending final disposition of the said appeal herein allowed, and

It Is Further Ordered, that a transcript of the record, testimony, exhibits and all proceedings herein be forthwith sent to the United States Circuit Court of Appeals for the Ninth Circuit, and

It Is Further Ordered, that no bond for costs, or other security on appeal, is required of respondents and claimant.

Dated February 17, 1948.

C. E. BEAUMONT

United States District Judge

[Endorsed]: Filed Feb. 18, 1948. Edmund L. Smith, Clerk. [35]

[Title of District Court and Cause]

ASSIGNMENT OF ERRORS

The Tug Rocona, etc., Johnson Western Company, a corporation, and Case Connolly Company, a corporation, respondents and claimant herein, assign the following errors in these proceedings:

1. The District Court erred in rendering a decree for libellant in any particular, or at all.

2. The District Court erred in holding that respondent, the Tug Rocona, was improperly and negligently navigated, maneuvered or operated, so as to cause Barge 4414 to override the mooring float.

3. The District Court erred in holding that respondent, Tug Rocona, approached the float with Barge 4414 in tow at an excessive and negligent speed under the circumstances then and there [36] prevailing.

4. The District Court erred in finding that respondent, Tug Rocona, negligently failed to stop the forward motion of Barge 4414 upon reaching the mooring float.

5. The District Court erred in finding that the respondent, Tug Rocona, negligently and carelessly moored Barge 4414, in that during said mooring said Barge was allowed to override said mooring float.

6. The District Court erred in finding that the respondent, Tug Rocona, failed to take reasonable steps to avoid causing Barge 4414 to override the said mooring float.

7. The District Court erred in finding that the damage to Barge 4414 was caused solely, proximately, or at all, by negligence of the Tug Rocona, her master, agents, or employees.

8. The District Court erred in finding that the loss of the cargo of Barge 4414 and the damage to Barge 4414 were caused solely, or at all, by the negligence of respondent, Tug Rocona.

9. The District Court erred in failing to find that libelant was negligent in respect to the manner, method and condition of loading Barge 4414, and in failing to find that libelant was negligent in providing, furnishing, and maintaining the mooring float, all as alleged in the Answer to Libel filed by respondents and claimant.

10. The District Court erred in holding that Barge 4414 was not moored safely and properly by respondents.

11. The District Court erred in holding that Barge 4414 sustained damage to her hull during the time said Barge was in custody of respondents, and prior to the completion of delivery of said Barge to the mooring float furnished and maintained by libelant.

12. The District Court erred in holding that Barge 4414 sustained damage prior to the time respondent, Tug Rocona, departed from the scene of the mooring. [37]

13. The District Court erred in failing to find that the anchor chain attached to the mooring float was too short to constitute a safe and proper mooring facility.

14. The District Court erred in presuming and inferring that respondents were negligent and through such negligence caused damage to Barge 4414, upon the basis of the speculation, conjecture and inference, which was not proven, that the said Barge 4414 sustained such damage prior to the time the respondent, Tug Rocona, departed from the scene of the mooring.

15. The District Court erred in placing the burden of proof upon respondents and claimant to show that re-

spondents were not negligent in towing and mooring Barge 4414.

16. The District Court erred in failing and refusing to accept the testimony of witnesses for respondents and claimant.

17. The District Court erred in applying the presumption of prima facie negligence against respondents and claimant upon proof of circumstances by libelant.

18. The District Court erred in holding respondents to have been negligent in the mooring of Barge 4414 and in holding that said respondents caused damage to said Barge, by basing said holdings and findings upon speculation and conjecture.

19. The District Court erred in holding that the momentum of Barge 4414 at time of mooring carried it slowly forward into and over the mooring float.

20. The District Court erred in finding that Barge 4414 began to take water and within an hour after mooring was discovered to be in a sinking condition.

21. The District Court erred in finding that all the allegations of the Answer filed by respondents and claimant which are inconsistent with the findings of fact made and entered by the District Court, are untrue.

22. The District Court erred in holding that neither [38] Barge 4414 nor libelant, or either of them, committed any fault or negligence in respect to the matters and things alleged in the Libel.

23. The District Court erred in holding that respondent, Tug Rocona, was negligent and in sole fault in the premises.

24. The District Court erred in holding that the damage to Barge 4414 was proximately caused solely by the negligence and fault of respondent, Tug Rocona.

25. The District Court erred in holding that Guy F. Atkinson Company is entitled to recover from respondent, Tug Rocona, and respondent, Johnson Western Company, all losses and damages sustained by libelant in the premises, together with interests and costs.

26. The District Court erred in admitting the opinion evidence of libelant's witnesses as to the cause of the damage sustained by Barge 4414, which opinion evidence was specifically objected to and admitted over the objection of respondents and claimant.

27. The District Court erred when, in effect, it implicitly applied the doctrine of *res ipsa loquitur* in deciding this cause.

Dated, February 16, 1948.

HILL, MORGAN & FARRER

By William S. Scully

Proctors for Respondents and Claimant

[Endorsed]: Filed Feb. 18, 1948. Edmund L. Smith, Clerk. [39]

[Title of District Court and Cause]

STIPULATION RE: STAY OF PROCEEDINGS
AND SECURITY FOR COSTS ON APPEAL

Whereas, respondents and claimant in the foregoing action have indicated their intention to appeal from the Interlocutory Decree and Order of Reference entered herein, and

Whereas, on or about June 20, 1947 respondents and claimant filed their Stipulation for Costs (Local Admiralty Rule No. 105) in the penal sum of Two Hundred

Fifty Dollars (\$250.00), in and by which all costs in this Court, or in any appellate court, were secured, and

Whereas, on or about May 28, 1947 claimant filed Special Bond to Marshal for Release of Libel in the penal sum of Five Thousand Dollars (\$5,000.00) in and by which the payment of any money awarded by the final decree rendered in this Court or the [40] appellate court was secured.

Now, Therefore, It Is Hereby Stipulated, by and between all of the parties to the foregoing action, through their respective proctors, as follows:

1. No additional bond or other security for costs on appeal in respect to the proposed appeal from the said Interlocutory Decree and Order of Reference need be posted or filed by respondents or claimant.

2. The Court, if it deems such action to be just, may in the course of allowing said proposed appeal, order that all further proceedings in this Court, including but not limited to the reference to a Special Master in respect to the ascertainment of damages sustained by libelant, be stayed pending the final disposition of such appeal.

Dated at Los Angeles February 16, 1948.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS and GREENE

HAROLD A. BLACK, and
GEORGE E. TONER

By George E. Toner
Proctors for Libelant

HILL, MORGAN & FARRER

By William S. Scully
Proctors for Respondents and Claimant

[Endorsed]: Filed Feb. 18, 1948. Edmund L. Smith,
Clerk. [41]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 43, inclusive, contain the original Citation on Appeal and full, true and correct copies of Libel in Rem and in Personam; Answer to Libel; Pretrial Stipulation; Findings of Fact and Conclusions of Law; Interlocutory Decree and Order of Reference; Notice of Appeal; Petition for Appeal; Order Allowing Appeal; Assignment of Errors; Stipulation re Stay of Proceedings and Security for Costs on Appeal and Stipulation and Order re Documents to be included in Apostles on Appeal which, together with the original Reporter's Transcript and original Libellant's Exhibits 1 to 5, inclusive and original Respondents' Exhibits A and B, transmitted herewith, constitute the Apostles on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing apostles amount to \$5.80 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 17 day of March, A. D. 1948.

(Seal)

EDMUND L. SMITH,

Clerk,

By Theodore Hocke,

Chief Deputy Clerk.

[Title of District Court and Cause]

Honorable Campbell E. Beaumont, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Tuesday, December 16, 1947

Appearances:

For Libelant: McCutchen, Thomas, Matthew, Griffiths & Greene, by George E. Toner, Esq., 704 Roosevelt Building, Los Angeles 14, California.

For the Respondents and Claimants: Hill, Morgan & Farrer, by William S. Scully, Esq., 411 West Fifth Street, Los Angeles 13, California [1*]

Los Angeles, California, Tuesday, December 16, 1947.

10:00 A. M.

The Clerk: 6936-B, Atkinson Company v. The Rocona.

Mr. Toner: Ready for libelant.

Mr. Scully: Ready for respondent and claimant, your Honor.

The Court: You may proceed.

Mr. Toner: If the court please, this is a libel arising out of damage sustained by a certain barge belonging to the libelant, called the Barge 4414. It was a rock barge, which was being used to transport rock from the quarry at Catalina Island to the mole construction job at Terminal Island.

I have here a 1947 chart of the harbor showing the completed mole. Now, this accident, as it occurred in 1945, of course occurred at a time when the mole had not

*Page number appearing at top of page of original Reporter's Transcript.

yet been completed, they were actually working on the mole, so I will have one of the witnesses alter the chart to indicate how far the mole job had been completed at the time.

Counsel has indicated that he is willing to stipulate to the entry of this chart as an exhibit.

The barge was loaded at Catalina Island by the libellant's employees and turned over to the respondent tug, and it was to be delivered at the job. At the job they have a number of mooring floats, which are square blocks of timbers bound together and moored to the bottom by an anchor chain and [2] anchor, and the barges were taken into the harbor, moored to the mooring floats, and there they awaited their need on the job.

The Court: Let me interrupt you there if I may, Mr. Toner.

Mr. Toner: Certainly.

The Court: Referring to page 3 of the stipulated facts, the last line in paragraph 6: "On the top side of the float, to a similar 'U' bolt is attached a mooring pendant in the free end of which an eye is woven." That does not explain the situation there entirely to me. I would like to have you amplify somewhat on that.

Mr. Toner: The float is roughly built like a block. It is 4 feet thick and 10 feet square. In the top there is an eye or staple, glorified staple, about 8 to 10 inches high, made of an inch and a half diameter iron.

The Court: Is that attached—

Mr. Toner: To the float.

The Court: The top side of the float?

Mr. Toner: Yes. The bottom side of the float has a similar eye, and that goes to the anchor chain.

The Court: I think that is clear enough.

Mr. Toner: To the top eye is this cable, and in the end of the cable they have a loop, a bite, an eye, and that is slipped over the mooring bit of the barge. [3]

The Court: This "U" bolt on the top side is of this heavy iron?

Mr. Toner: Yes.

The Court: And attached to that—is that a cable?

Mr. Toner: That is a metal cable.

The Court: That is used for the purpose of mooring the craft that comes alongside?

Mr. Toner: The barge is moored to the float, and then stays there until it is needed on the job.

The Court: That is all I wanted to find out.

Mr. Toner: Very well. I will call Mr. Jackson, please.

Mr. Scully: If your Honor please, may I say something for a moment? There are just a couple of items that I would like to refer to that Mr. Toner mentioned, may it please your Honor. One, that I have indicated agreement and stipulation that the chart may go in as evidence. That is substantially true, except that inasmuch as according to counsel's statement it is not a true representation of the conditions at the time material to the issues on trial, I should like to have it entered that I am agreeable to the use of the chart by the witnesses for the purpose of illustrating their testimony, not as the chart in itself proving anything as a piece of evidence. Only insofar as it may be used by the witnesses for purposes of illustration.

I believe that is probably what Mr. Toner meant, isn't it, [4] Mr. Toner?

Mr. Toner: Yes, that is correct.

The Court: It is intended to be used for illustrative purposes only?

Mr. Scully: Yes, your Honor. Secondly, Mr. Toner I think rather inadvertently, because his allegation does not support it, and our stipulation does not accord with that view—the engagement of the libeled tug, The Rocona, in respect to the towing, was not to deliver the barge to the job, but to deliver her to the harbor and moor her safely.

The Court: Read that statement, please.

(The statement was read by the reporter.)

The Court: Proceed. Call your witnesses.

Mr. Toner: There is one other point I think I overlooked, and that is that counsel is going to present a tide table and the official record of the state of the tide at the hour involved. We will have no objection to that, because those are official records.

I call Mr. Jackson.

Mr. Scully: I will have to acquire that from the United States Coast and Geodetic Service offices in this building. I haven't had an opportunity to do that yet, but I will do so during the next recess. [5]

F. C. JACKSON,

called as a witness by and on behalf of the libellant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: F. C. Jackson.

Direct Examination

By Mr. Toner:

Q. What is your present address, Mr. Jackson?

A. Big Bear Lake, California.

Q. Your present occupation? A. A realtor.

(Testimony of F. C. Jackson)

Q. You are not now employed by the Guy F. Atkinson Company? A. No, sir.

Q. What has been your previous experience about the harbor?

A. Well, I was from 1918 to 1925 superintendent for the Harbor Department building breakwaters and so forth, had charge of the quarry and the equipment between Catalina and San Pedro, and then I was employed by the Atkinson Company for 10 years as superintendent, built the Anaheim landing breakwaters, and from there went over to the mole for a short while.

Q. On March 31, 1945 you were employed by the Guy F. Atkinson Company? [6] A. Right.

Q. In what capacity were you employed?

A. Superintendent of one shift, of what we call the graveyard shift, from 12:00 to 8:00 in the morning.

Q. What was the nature of your duties in the morning?

A. As a general superintendent, to see that the operation was carried on efficiently.

Q. What connection did you have with the unloading and loading of these rock barges?

A. In charge of it.

Q. At which end of the job did you stay?

A. Well, practically all over, but mostly with the derrick barges.

Q. That was at the Los Angeles end?

A. Yes, that's right. Only there. Not at the Island.

Q. You were not at the Island? A. No, sir.

Q. Mr. Jackson, I show you the United States Geodetic Service chart No. 5147, Los Angeles and Long Beach Harbors, and ask you to look particularly at the area

(Testimony of F. C. Jackson)

about the mole and advise the court as to whether or not that is the true and correct representation of the mole as it exists at the present time.

A. As far as I know it is. It wasn't finished when I left there. [7]

Q. Would you mark on this chart the situation as it existed with reference to the extent of completion of the mole on March 31, 1945?

A. Well, as close as I can remember it.

Q. Just approximately as you remember it.

A. As close as I can remember, this—I would say this was finished about like that (indicating).

The Court: Talk a little louder, please.

A. As far as I remember, that has been quite some time ago and I haven't just kept it in my mind or thought much about it since then, but it was finished approximately, as far as I can remember, up to here (indicating), about that place there. We had begun to get some of this in here (indicating).

Q. By Mr. Toner: Indicating the portion of the mole toward the end of the mole?

A. That's right. The fact of the matter is that we did have some at a low water mark at the end of the mole. But as far as finished—

Q. Will you mark the end of the mole with the letters "End," end.

(Witness does as requested.)

Q. Will you mark the point you have indicated as the end of the construction of the mole in 1945 with the figures "1945." [8]

(Witness does as requested.)

(Testimony of F. C. Jackson)

Q. Where were the mooring floats?

A. Approximately right in here (indicating), if I remember right.

Mr. Toner: Witness marking an "X."

Q. By Mr. Toner: Was there more than one float?

A. Yes, there was one there and one out in here, if I remember correctly (indicating). We had two or three, I am not sure, but I am sure of these two.

Q. You have marked X's at the points where these mooring floats were? A. Yes.

The Court: Mark those X's a little heavier, please, Mr. Jackson. There are so many marks there it is hard to see.

(Witness does as requested.)

Q. By Mr. Toner: Mr. Jackson, will you describe these mooring floats to the court?

A. Well, they are made out of solid timber, about 4 by 10 by 10 with a "U" bolt on each side of them.

Q. When you say 4 by 10 by 10, what are those dimensions? A. 10 foot square and 4 foot thick.

Q. Are they solid or hollow? A. Solid.

Q. You said there was a "U" bolt at the top and bottom? [9] A. That is correct.

Q. What is the function of these "U" bolts?

A. The one on the bottom holds the anchor chain, the chain that runs from the mooring to the anchor. The other one holds the pendant from the mooring that the barge is fastened to.

Q. What does the anchor line consist of?

A. Sometimes it is a chain; sometimes it is a cable.

Q. What was it at that particular time?

A. I believe it was a cable. I am not positive of that.

(Testimony of F. C. Jackson)

Q. How long a cable was it?

A. Well, that I couldn't say.

Q. Approximately. A. I should say 75 feet.

The Court: It was a metal cable?

The Witness: A metal cable, I believe, your Honor.

Mr. Scully: How far did the witness say?

Mr. Toner: 75 feet.

Q. By Mr. Toner: How was it affixed to the bottom?

A. I wouldn't say as to that one. Some of them we had large heavy rock and some we had anchors, and to that one I wouldn't say.

Q. About how long was the mooring pendant?

A. About 50 feet. We make them about 50 feet long, [10] with an eye on each end.

Q. How large was the eye on each end?

A. Those eyes probably would be—probably 3 feet opening, maybe a little larger, from the end of the eye to where it is spliced. In other words, so it will go around a bit that is about 18 inches square.

Q. At the other end of the mooring pendant from the end that went on to the bit there was also another eye?

A. There is an eye there that was shackled to the eye bolt.

Q. Of what material was the mooring pendant made?

A. $\frac{7}{8}$, I believe, $\frac{7}{8}$ cable.

Q. Steel cable? A. Yes.

The Court: Read the last question and answer.

(The record was read by the reporter.)

Q. Will you describe the rock barges, giving the approximate dimensions and physical characteristics?

Mr. Scully: I object to the question, may it please your Honor, unless he is asked to describe the barge

(Testimony of F. C. Jackson)

which is in suit. Other barges have no materiality to this proceeding.

The Court: Yes, I think that is true.

Q. By Mr. Toner: Will you describe Barge No. 4414, Mr. Jackson, giving the approximate dimensions? [11]

A. If I remember correctly, those barges were about 40 by 130; 40-foot beam and about 130 feet long, square on the end with a rake.

The Court: Would that apply to this particular one?

A. Yes, sir.

Q. By Mr. Toner: Was Barge 4414 similar to the other barges that were used on the job?

A. Similar, yes.

Q. Was Barge 4414 described as a flat barge? Is that how you would describe it?

A. Yes, it is a flat barge.

Q. Will you draw a rough diagram here for the court of the cross-section of the Barge 4414?

(Witness does as requested.)

Q. Is this the top of the barge?

A. That is the top of the barge, and this is the way the bottom runs with a rake, what I call the rake.

The Court: I don't believe you are talking aloud enough for Mr. Scully to hear.

Mr. Scully: I am having some difficulty, your Honor.

The Court: Read the last answer.

(The record was read by the reporter.)

The Court: Proceed.

Q. By Mr. Toner: Where on the barge is the rake located? [12]

A. At the bow and the stern, both.

(Testimony of F. C. Jackson)

Q. Will you describe the rake for the record?

A. There is about 18 inches that comes down from the bow, and then the rake; in other words, the bow of it comes back down about like that (indicating), so as to ride the sea. It doesn't come down straight like that (indicating); it has that rake to it.

The Court: That curve on each end is what you call the rake?

The Witness: Yes, sir.

Q. By Mr. Toner: Will you write the word "rake."
(Witness does as requested.)

Q. Very well. Thanks. Mr. Jackson, is the barge roughly square on the ends?

A. Yes, sir, straight up and down.

Q. In order to explain to the court the procedure, will you describe what was done—

The Court: Mr. Toner, Mr. Jackson made some drawing there, but you haven't offered it to the court.

Mr. Toner: I am sorry, your Honor. I should like to have this diagram marked for identification.

The Court: Let it be marked as Libellant's Exhibit 1 for identification.

It won't do the court much good if it is just marked for identification. [13]

Mr. Scully: I have no objection to it going in evidence for what it is worth, your Honor.

The Court: Let it be received. I want to look at it and see what it shows.

(Document passed to the court.)

The Court: This rectangular part here, Mr. Jackson—

The Witness: That is the bit that we put the cable over, your Honor.

(Testimony of F. C. Jackson)

The Court: That is what these little things are?

The Witness: Yes.

The Court: I am talking about the large one.

The Witness: That is the sides of the barge looking straight down.

The Court: That is the top of the barge looking straight down?

The Witness: Yes.

The Court: This would be the side?

The Witness: Yes, looking down.

The Court: May I mark "Side" over here?

Mr. Toner: Yes.

The Court: Mr. Scully, may I mark "Side" there?

Mr. Scully: Yes, your Honor, whatever makes it convenient to the court.

The Court: I have an idea that Mr. Jackson isn't a much better artist than I am, and that wouldn't be any too good, [14] but I think I get the idea. This part that is marked the side with the rake on each end represents the lower part of the barge, the side that goes into the water?

The Witness: That is correct.

The Court: And the top part here would be the top side of the barge?

The Witness: Yes.

The Court: And these little four rectangles in the corner are what?

The Witness: The bits that they moor the barge with, where they put the cable over them from the mooring.

The Court: From the mooring they go—

The Witness: Around it.

The Court: All right.

(Testimony of F. C. Jackson)

Q. By Mr. Toner: When these barges are towed from Catalina Island, are they towed singly or in tandem?

Mr. Scully: Just a minute. I object very much to be interrupting counsel's examination, but—

The Court: Yes, I think that is too general.

Mr. Scully: And it doesn't relate to the facts on trial.

The Court: Not what generally is done, that wouldn't be important, would it, Mr. Toner? What was done in this particular case?

Mr. Toner: I think, if the court please, we are entitled to show that what was done in this particular case was done in [15] accordance with the customary practice.

The Court: Is there any issue that that would apply to?

Mr. Toner: I don't believe so. I don't believe it is a controverted fact.

The Court: So it seems to me the objection would be good.

Q. By Mr. Toner: When Barge 4414 was brought in—

The Court: The stipulated facts show there were two barges brought, and one was released to another tug.

Mr. Toner: Yes.

The Court: And there is no question concerning that one.

Mr. Toner: That is correct.

Q. By Mr. Toner: Where were you when Barge 4414 was brought in, Mr. Jackson?

A. I hadn't gone on duty yet.

Q. Where was Barge 4414 when you went on duty?

A. It was laying at the outside mooring that I marked here.

Q. You marked two moorings, Mr. Jackson. Which one? A. At this mooring here (indicating).

(Testimony of F. C. Jackson)

The Court: Mark that "FCJ-1."

(The witness does as requested.)

Q. By Mr. Toner: When you first saw Barge 4414, what was her condition?

A. Well, it was floating just about trim. [16]

Mr. Scully: I didn't hear the witness' answer.

(The answer was read by the reporter.)

Q. By Mr. Toner: Do you know how long that was after she had come in?

A. That was shortly after, very shortly after it came in, because the first thing I did then was to make the rounds to look at all the barges and see how everything was laying.

Q. By "very shortly" what do you mean in minutes?

A. I would say 12:30.

The Court: Read the last question and answer.

(The record was read.)

Q. By Mr. Toner: How long had Barge 4414 been there when you first saw it?

A. I couldn't say that.

Q. Do you know about when she came in?

A. I wouldn't like to say that because I don't positively know.

The Court: He wasn't there, Mr. Toner, he testified.

The Witness: No, I wasn't there.

The Court: It would be hearsay.

Q. By Mr. Toner: What was the depth of the water at the point she was moored?

A. About 28 feet, I think.

Q. Did you examine Barge 4414 subsequently?

A. No. The next time we made the rounds about there [17] it was listed quite badly and we opened the

(Testimony of F. C. Jackson)

stern hatch and it was getting pretty well filled up with water, so we started to get a tugboat to pull it inside.

Q. Was there anything unusual that happened to the barge?

A. At the time I didn't know there was anything.

Q. What did the fact that she was listing indicate to you?

A. She was leaking.

Q. Was she loaded at this time? A. Yes.

Q. Did anything happen to the load?

A. Not at that time.

Q. At any other time. A. Oh, yes, because—

The Court: Go ahead.

A. The next time I made the rounds, why, she had slipped part of her load.

The Court: Now, Mr. Jackson, when you first saw the barge, as I understand your testimony she appeared to be trim.

The Witness: That's right.

The Court: That would indicate in proper position.

The Witness: Yes, sir.

The Court: Then when was it that you saw her that she appeared to be listing? [18]

The Witness: I should judge that would be in the next hour or hour and a half.

The Court: You first saw her about 12:30?

The Witness: About that, yes.

The Court: About an hour or an hour and a half after that she was listing?

The Witness: That's right. And we started after a tugboat then so we could get her inside to unload her. By the time we got back she had slipped her load.

The Court: That is, part of the load on it—

(Testimony of F. C. Jackson)

The Witness: Dumped it off.

The Court: It had listed so much that part of it had gone overboard?

The Witness: That is right.

Q. By Mr. Toner: Did all of the load fall on one side?

The Witness: That I don't know. But there was quite a bit of rock left on the barge, because I wasn't there when it tipped its side over. It righted up and there was quite a bit of rock left on top of the barge.

Q. Did you see the barge later on? A. Yes, sir.

Q. What was her condition then?

A. She was upside down when I saw her the next time.

Q. When was the next time you saw her?

A. Next evening when I went to work. [19]

Q. Did you notice anything unusual about her at that time? A. It just had the hole in it, that is all.

Q. Where was there a hole in it?

A. I should judge about 25 feet back from the rake, from the bow of the barge.

Q. What was the nature of the hole? How large was it?

A. The plank was caved in, oh, I should judge a foot, maybe a little more. The planks were caved in like something had hit it from underneath (demonstrating).

Q. Was there anything peculiar about the hole itself?

A. Yes, more or less it was about the shape of a "U" bolt.

Q. How far in from the side was it?

A. I should say 5 or 6 feet.

Q. What is the thickness of the planks in the bottom of the barge? A. I think they are 4 inches.

(Testimony of F. C. Jackson)

Q. This hole was punched through the bottom?

A. That's right.

Q. Have you ever seen the actual mooring of a barge similar to Barge 4414?

Mr. Scully: Just a moment, may it please your Honor. I object to that question and the latter question which it undoubtedly seeks to follow, inasmuch as habit, custom, course, [20] and usual procedure is not material to the facts here, where we have witnesses to what occurred.

Mr. Toner: If the court please, we are charging respondents with not operating in accordance with the expected and usual and proper means and manner of mooring this float. I think we are entitled to show what is proper from this man as an expert witness. He has had a wealth of experience in this type of work, he has seen these barges moored many times, and I think I am entitled to show what is the proper way of mooring as the norm of conduct.

Mr. Scully: Your Honor, he hasn't testified that he has moored them, or that he has seen many barges moored. He testified to his presence on the job and the work he did. But even so, aside from all of that, I still stand on my original objection that we are investigating here what was done or not done under the circumstances set forth in the libel, and it is those circumstances, those actions, which this court is called upon to decide as to whether or not due care, due and proper seamanship, proper judgment, et cetera, was exercised on the part of the master involved.

The Court: Will you read the question, please, Mr. Goldstein?

(The question was read by the reporter.)

(Testimony of F. C. Jackson)

The Court: That is a preliminary question. It is overruled. [21]

A. Yes.

Q. By Mr. Toner: Will you describe the process of mooring?

The Court: I do not think just seeing one done would be sufficient foundation.

Q. By Mr. Toner: How many times have you seen a barge similar to Barge 4414 moored?

A. Hundreds of times.

Q. Will you describe the process?

A. Surely. When they get inside of the harbor the towline is pulled in, they take a short bite on the towline and then gradually lose momentum, and come up to a mooring very slowly, pick up the pendant and slip it over the bit, and then unhook their bridle and pull out.

Q. By pulling out you mean the tug pulls away?

A. The tugboat pulls away, yes.

Q. And the barge is left at the mooring?

A. That's right.

Q. Is there any danger associated with mooring a barge, and if so, what is it?

The Court: You had better just have him answer one question at a time.

Q. By Mr. Toner: Is there any danger to the barge associated with mooring it? A. Yes. [22]

Mr. Scully: Objected to as calling for a conclusion of the witness.

The Court: It is overruled. You may answer it.

(The answer is read.)

The Court: It may stand.

(Testimony of F. C. Jackson)

Q. By Mr. Toner: What is the danger?

A. If they come in with too much momentum, why, they are liable to either break the pendant, or as I think was done at this time, that the mooring was pulled underneath the barge.

The Court: You were not asked for this time. Let that part go out.

Q. By Mr. Toner: What is the danger?

A. You can break your mooring chains, or you can break your pendant, or anything else.

Q. Can you pull the mooring float under the barge?

A. Yes, you can.

Q. How would you pull the mooring float under the barge?

A. When the barge hits the mooring it slips right over the top.

Q. How far does it go?

The Court: The barge slips over the top of the mooring?

The Witness: That's right, sir. It can only go as far as the pendant will let it go.

Q. By Mr. Toner: Then what happens? [23]

A. It comes up with a jerk.

Q. How does that endanger the barge?

A. Well, it could punch a hole in it.

Q. What is the proper step to take to avoid such a danger? A. Come in as slow as possible.

Mr. Scully: Objection; it calls for a conclusion of the witness, your Honor, and it is invading the province of the trier of the fact here, what is proper and so forth.

The Court: Read the question, please.

(The question was read.)

(Testimony of F. C. Jackson)

The Court: I think it is anticipatory. That may be a proper question to be asked on rebuttal, but at the present time the court believes it is not. The objection is sustained.

Q. By Mr. Toner: Mr. Jackson, you saw Barge 4414 was loaded with 879 tons of rock, did you?

Mr. Scully: Objected to as leading.

A. I know it was loaded with rock, but I don't know how much was on there.

Q. By Mr. Toner: You saw the barge as she was loaded that night?

A. Yes.

Q. Assume the wind to be negligible, and the ordinary currents and surges of the Los Angeles Harbor to be present; state whether in your opinion it is possible for a barge [24] similar in description, dimensions and draft of Barge 4414, loaded as she was loaded that night, to override a mooring float similar in size and dimensions to the one we have been discussing, without some additional motive force being applied to such barge by some agency other than the normal wind and current, will you state whether or not in your opinion a barge such as I have described could override the mooring float?

A. No, sir, I don't think so.

The Court: Do you understand the question?

The Witness: Yes, sir. I don't think so, without it had some other motive power to pull it.

Q. By Mr. Toner: Is it possible for it to go over the float?

A. No, because the wind or current would swing it around.

Q. By swinging it around what do you mean?

A. If it was moored properly to the mooring then the current or wind would swing the barge around.

(Testimony of F. C. Jackson)

Q. So that the barge would head into the wind, you mean? A. That's right.

Q. Where would the mooring float and the anchor and the mooring pendant be?

A. Well, that would be away from the barge, the wind [25] would blow it around where it would drag on the mooring. It wouldn't touch, oh, at any time it wouldn't touch the mooring.

Q. Did you examine the damage to Barge 4414?

A. Yes, sir.

Q. Do you have an opinion as to what is the cause of the damage to Barge 4414?

A. I have my own personal opinion. It was that the barge overrun the mooring, and when the mooring pendant come up, turned the barge up, the "U" bolt punched a hole in it, that is my personal opinion.

Q. Did you make any complaint to the owners of the tug that was towing that Barge 4414 that night?

A. I am not too positive about that. I know I did one night, but that particular night I am not positive on that.

Q. To whom did you talk?

A. To the man that was in charge at that time of night. I don't remember the man's name.

Q. At what company?

A. The company that owned the tugboat.

The Court: You say at that time of night; what do you mean, Mr. Jackson?

The Witness: Between 12:00 and 8:00.

The Court: When you first saw it it was 12:30?

The Witness: That's right. [26]

The Court: That would be 12:30 A. M.?

The Witness: That's right.

(Testimony of F. C. Jackson)

The Court: And you were on duty from 12:00 midnight to 8:00 the next morning?

The Witness: Correct.

The Court: Was it within that period that you made the statement to the owner of the tug?

The Witness: I don't remember that night, at that night, whether I did or not. It has been so long ago, your Honor, and I haven't thought much about it.

The Court: Go ahead and ask him, Mr. Toner.

Q. By Mr. Toner: You do remember, however, Mr. Jackson, that you did make a complaint to someone?

A. Yes, I did.

Q. What did you tell him?

Mr. Scully: Just a moment, Mr. Jackson. Your Honor, it is not established that there was any complaint made in respect to the mooring of Barge 4414, or the actions of the Rocona that night. The witness has clearly stated that he doesn't know exactly when he made a complaint. He made a complaint to a company whose name he cannot recall, that was doing towing. Now, I submit that unless it is clearly first established that any statement or conversation with parties—unless it is first established that that was in connection with the facts on trial, it is wholly immaterial and inadmissible. [27]

The Court: That is entirely true.

Mr. Toner: He did state, however, that he made a complaint to the company.

The Court: Yes, but it wasn't very certain.

Mr. Toner: I was going to ask him what the nature of the complaint was.

The Court: You had better ask him to whom he made the complaint. Mr. Jackson ought to know, if not to

(Testimony of F. C. Jackson)

Q. So that the barge would head into the wind, you mean? A. That's right.

Q. Where would the mooring float and the anchor and the mooring pendant be?

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(Testimony of F. C. Jackson)

whom he made the complaint, where he made the complaint. And if it wasn't the same night that he discovered the condition of the barge, then whatever night it was should be rather definitely established. In other words, so it would be tied in to this particular accident and not to some other.

Mr. Toner: I was coming to that, if the court please.

Q. By Mr. Toner: Mr. Jackson, you have testified that you made a complaint to the owner of the Tug Rocona.

Mr. Scully: No, he did not so testify. I object to that.

The Court: No, I do not think he did. I am not so sure that he did.

Q. By Mr. Toner: To whom did you make the complaint, Mr. Jackson?

A. To the tugboat company that owns the Rocona.

Q. How did you make the complaint? Personally or by telephone? [28]

A. Telephone.

Q. What time of the night did you make this complaint?

A. That I won't say, because I can't say definitely.

Q. It was, however, between the hours of 12:00 and 8:00 in the morning?

A. That's right.

Mr. Scully: I object to the question as leading.

The Court: It is leading.

Mr. Toner: He has already testified to that. I am just reviewing it.

Q. By Mr. Toner: Was it during the time you were on the job?

A. No other time.

Q. Do you recall the name of the man to whom you made the complaint?

A. No, sir.

Q. Do you know his capacity?

(Testimony of F. C. Jackson)

A. He was in charge of the tugboats on that shift. I don't remember his name.

Q. What was the nature of the complaint?

Mr. Scully: I object, your Honor, as not sufficiently identified with the facts before this court, the issues before this court.

The Court: Sustained.

Q. By Mr. Toner: Do you recall when the complaint was [29] made? A. No, I couldn't.

Q. Was the complaint made with reference to the mooring of Barge 4414, or was it made with reference to some other accident?

Mr. Scully: Just a moment, Mr. Jackson. I object to the question as leading, your Honor. Counsel has gone with this witness up and down trying his best to get him on the track to say something positive, and he is not succeeding, so he is resorting to leading questions, to which I must object, because this witness is a very willing witness, your Honor.

The Court: The objection is overruled.

Mr. Toner: Read the question.

(The question was read.)

The Witness: It wasn't an accident that I complained of the night I remember about. I was complaining about the way they gave us the service, that is what I was complaining about.

The Court: He wasn't complaining about this particular incident.

The Witness: No.

Mr. Toner: I was under the impression that was what the complaint was about.

The Court: It would not be material, then.

(Testimony of F. C. Jackson)

Mr. Toner: No. [30]

Q. By Mr. Toner: Mr. Jackson, you stated that in your opinion the damage to Barge 4414 was caused as she was pulled over the mooring float, is that correct?

A. That is my personal opinion.

Q. Upon what do you base that opinion?

A. The shape of the plank, and so forth, the hole that was in the bottom of the barge.

Mr.. Toner: That is all.

Cross-Examination

By Mr. Scully:

Q. Mr. Jackson, have you ever been to sea?

A. Kindly explain what you mean by "sea."

Q. Have you ever served as a hand or as an officer aboard a vessel at sea? A. No, sir.

Q. Have you ever held any license—

A. No, sir.

Q. —as seaman or officer aboard a vessel?

A. No.

Q. How long had you worked for the Atkinson Company at the time that this occurrence happened in 1945?

A. About nine years.

Q. And how long did you work for them afterwards?

A. About two years.

Q. And you left their employ of your own volition, did [31] you? A. Absolutely.

Q. And you are still friendly with them?

A. Surely.

Q. You wouldn't do anything to hurt them?

A. I wouldn't do anything to hurt anybody.

(Testimony of F. C. Jackson)

Q. Did you ever take a sounding of the depth of the sea at the point of the mooring of Barge 4414 on the 31st of March, 1945? A. No, sir.

Q. You stated that you thought the depth at that point was 28 feet? A. Around 28 feet, yes, sir.

Q. Do you mean at a time of flood tide or low tide?

A. That would be low tide.

Q. Do you know what the tide was on that day?

A. I do not.

Q. Your guess of 28 feet at low tide was a guess, wasn't it, inasmuch as you hadn't taken a sounding?

A. Yes, because we put our mooring in the water about that depth, 28 feet.

Q. So you really have no knowledge what the facts were at that particular mooring, have you?

A. I said about.

Q. But you have no knowledge of it, have you? [32]

A. No, sir.

Q. Did you ever measure the mooring pendant attached to the float in question? A. The pendant?

Q. Pendant, the mooring pendant that is attached to the top side of the float, which you understand is used—

A. I understand that, but we made all those approximately 50 feet long.

Q. Did you ever observe this particular one?

A. No, sir, I never measured any of them.

Q. Did you see this one when it was made?

A. No, sir.

Q. Did you see it when it was installed?

A. No, sir, but I have picked it up out of the ocean a good many times and put it on top of the float.

Q. Did you make any inspection of that float after the occurrence concerning Barge 4414? A. No, sir.

(Testimony of F. C. Jackson)

Q. When you made your rounds for the first time upon coming on duty that night, which was the night of March 31st-April 1st, 1945, you went out in a speedboat, didn't you? A. Yes, sir.

Q. And you were following your duties in respect to watching the barges and observing them as they had come in for the job? [33] A. Yes, sir.

Q. That was your mission on that speedboat trip, wasn't it? A. That's right.

Q. Your duty at that time and place was to see if everything was secure, is that not true?

A. That's right.

Q. And you had other barges moored to Atkinson floats at that time and place, didn't you?

A. Yes, sir.

Q. You observed them? A. Yes, sir.

Q. And everything was secure as to them?

A. Yes.

Q. And you observed this barge? A. Yes, sir.

Q. And everything was secure as to that barge?

A. That's right.

Q. Then an hour and a half later you found that she apparently was in trouble? A. That's right.

Q. Because she was slipping her load and was apparently listing—did I recall your testimony correctly?

A. Yes, sir.

Q. Mr. Jackson, to whom have you talked about this [34] case before this morning?

A. I beg your pardon?

Q. To whom have you spoken about this case before this morning? A. About this case?

Q. Yes. A. The attorney.

(Testimony of F. C. Jackson)

Q. Do you recall that after it was ascertained that the Barge 4414 was in trouble at her mooring on the early morning of April 1, 1945, other craft were called to assist her?

A. We went in to get the boat to pull the barge inside, so we could get it unloaded, thinking we might save it.

Q. I understand. Perhaps I didn't make my question clear. Do you recall that after she was found to be in difficulties, she was slipping her load and was listing, that other craft were called to assist Barge 4414?

A. Yes.

Q. How many craft? A. Just one.

Q. The Fortuna?

A. I believe that is the name of the tugboat.

Q. It was a tugboat, wasn't it?

A. Yes, sir. [35]

Q. Were you on the spot when the Fortuna was assisting at the barge?

A. No, because the barge had slipped its load, we got back there before the Fortuna got there, and the barge had slipped her load already.

Q. Did you see the Fortuna make fast to the barge?

A. That I can't remember. I don't remember. After it slipped its load I know we hooked onto it and pulled it inside.

Q. You know that the Fortuna did at some time make fast to the barge? A. That is right.

Q. And did pull her in? A. That is right.

Q. You also know, do you not, that the Fortuna assisted in getting her loose from whatever obstacles she was afoul of? A. Well, naturally.

(Testimony of F. C. Jackson)

Q. The surge of the sea, the outer harbor surge, at that time and place, as it is in every other instance, is something entirely different from the wind, isn't it?

A. There is some surge right in there, but not a whole lot.

Q. Just a moment. I didn't ask you that. Please follow my question.

The Court: Read the question.

(The question was read.) [36]

The Witness: Well, yes. Yes, I will say yes.

Q. By Mr. Scully: And the wind doesn't make the surge of the sea, does it? A. No, I can't say that.

Q. Do you know? A. I say that it does not.

Q. So that it is possible, is it not, Mr. Jackson, to have a surge of the sea rolling the sea in one direction, with the wind in another quarter?

Mr. Toner: If the court please, I think that this is all rather general. I think that the question should be directed to what the situation was at the time and place, and I therefore object to the line of questioning.

Mr. Scully: May I be heard on that a moment?

The Court: I think it is proper cross-examination. It is overruled.

Q. By Mr. Scully: Do you understand my question, Mr. Jackson? It is rather complicated.

A. I think your idea and mine are rather different. You are trying to get me to say that the wind was rolling up a sea, which isn't a real surge.

Q. No. Mr. Jackson, please don't speculate as to what my purpose is in examining you under cross-examination. First of all, I want to assure you that I am not trying to trap you. Let's understand that. I am trying to

(Testimony of F. C. Jackson)

be fair and honest with [37] you. I am merely trying to test not only your recollection, but I am trying to test the subject-matter—

The Court: You do not need to explain any further to the witness, Mr. Scully.

Mr. Jackson, you just answer the question if you can remember what it was. Do you remember what it was? Could the surge that Mr. Scully has been speaking of be in one direction and the wind in another direction?

The Witness: It could be.

Mr. Scully: Your Honor, may I see Plaintiff's Exhibit 1?

(A paper was handed to counsel.)

Q. By Mr. Scully: Mr. Jackson, perhaps I don't fully understand the purport of this sketch. Am I correct in understanding that you drew a cross-section here of the barge? A. This is supposed to be the top.

The Court: Just as if—

The Witness: You were looking down on it, yes.

Q. By Mr. Scully: This is the side, and this is the bow over here, and this is the stern; is that about correct?

A. You can use it any way you want to?

Q. It is really a double-ender, isn't it?

A. That is correct.

Q. So that seeing her move through the water she would move about like that (indicating), is that correct?

A. Yes. [38]

Q. I am just trying to get myself oriented on your sketch. Will you take my pencil and designate on the bottom of the barge where you observed approximately the point of damage or the point of impact?

A. About 5, 6 feet in.

(Testimony of F. C. Jackson)

Q. Will you mark that "J-2"?

(Witness does as requested.)

The Court: Five or six feet in from what?

The Witness: From the bottom of the barge. In under.

Q. By Mr. Scully: From the side? A. Yes.

Q. From the starboard side or port side?

A. I believe it was starboard. I am not too positive. I believe it was the starboard side.

The Court: Then the bow would be at this end if this is the starboard?

The Witness: This end here (indicating).

Mr. Scully: Let's mark this "Bow," shall we, to designate it?

The Witness: Sure, we can mark it.

(Witness does as requested.)

The Court: And this is 28 feet across, isn't it?

The Witness: It is more than that. It is about 40 feet.

The Court: You think it was about 5 or 6 feet in under the bottom? [39]

The Witness: That's right. And somewhere around 25 feet back from the bow.

The Court: Do you think you have got about the right distance here?

The Witness: Yes.

The Court: I think not, because it is 130 feet long.

The Witness: Yes.

The Court: Well, in any event we don't have to be too particular.

Mr. Scully: It is not scaled.

(Testimony of F. C. Jackson)

The Court: In any event we might say it would be in about this position underneath (indicating)?

The Witness: That is right, your Honor.

The Court: That would be "J-3."

Q. By Mr. Scully: J-3 indicates a point—correct me if I am wrong in reciting this—the point J-3 was observed to be approximately 25 feet in the direction of the stern from the forward rake? A. That is right.

Q. From the bow? A. About that.

Q. And about 5 or 6 feet inboard from the starboard side of the craft, is that correct?

A. That is about correct, yes.

Q. All right. Now, you saw— [40]

The Court: For purposes of understanding the position we have made this "J-3" on top. As a matter of fact, it showed only on the bottom, is that correct?

The Witness: That's right.

Q. By Mr. Scully: And the direction of the damage was inward as observed on the bottom, was it?

A. In, yes.

Q. You saw the barge—

The Court: That would be inward and upward?

The Witness: Yes. In other words, if this was the bottom, the planks was pushed in, pushed up.

The Court: Go ahead.

Q. By Mr. Scully: You saw the barge the next day after she was capsized, didn't you? A. Yes.

Q. And she had been beached, I believe, for that purpose?

A. She wasn't beached. She was pulled up alongside of the dock.

Q. It was for an inspection purpose that she was capsized? A. Yes, to be repaired.

(Testimony of F. C. Jackson)

Q. As you looked at the hull that day did you notice any markings on the hull as apart and distinct from the hole itself? [41]

A. If I remember right there was kind of a scraping across here.

Q. Do you mind if I draw a rectangle and call it the bottom of the barge? I am no naval architect. We will call it the bottom of the barge. We will forget about the rake. The rake would be going this way (indicating) if we had it bottom side up. Let's put this mark and call it "J-4" as the arbitrary point of the hole through the bottom. I will mark "Bow" and I will mark "Stern" on this rectangle. Will you now point out the location or approximate location of the markings that you observed on the hull? A. (Witness does as requested.)

Mr. Scully: The witness has drawn a light line.

Q. By Mr. Scully: Do you mind if I trace that a little heavier? A. No.

Mr. Scully: Indicating parallel to the—this would be the starboard side?

Mr. Toner: That would be port side if she was upside down. Unless we are looking at it from below.

Mr. Scully: In any event, it was in the direction of the bow, was it, towards the point of damage?

The Witness: After all, there was a hole there, that is all.

Q. By Mr. Scully: Did you, Mr. Jackson, notice some [42] markings on the hull of the vessel in the direction of the starboard side?

A. It seems to me, if I remember right, there was a kind of a scraping for a short distance, four or five feet, up to just about where the hole is.

(Testimony of F. C. Jackson)

Q. You didn't notice any scrapings further towards the bow?

A. I don't remember. That has been so long ago.

Q. I realize we can't expect you to remember exactly.

The Court: But the scraping indication that you did notice was from the hole towards the bow?

The Witness: That's right, yes, sir.

The Court: That is sufficient.

Q. By Mr. Scully: The mooring that you have marked with X's on the chart, was there more than one?

A. There was two moorings here. This is one here; the second one down was the one that 14 was moored to.

The Court: That is "J-1"?

The Witness: Yes.

Q. By Mr. Scully: About how far was "J-1" off the shore or the point where you were working and the Atkinson job was being constructed?

A. I would say about 300 feet.

Q. And this was dark, of course? A. Sure. [43]

Q. Was there a moon?

A. I don't remember whether there was moonlight or it was dark. It was about 300 feet off of there, that is all I can say.

Q. The other mooring marked "X," which does not bear any "J" designation, was occupied at this time by some other craft? A. That I can't answer.

Q. You don't know? A. I don't remember.

The Court: Is there much more cross-examination?

Mr. Scully: I am about concluded, your Honor.

The Court: Very well. Go ahead.

(Testimony of F. C. Jackson)

Q. By Mr. Scully: Have you ever assisted in mooring any of these vessels, any of these barges?

A. Not these particular barges. Only by pulling the cable up and having it there when the boys come in.

Q. Your job has been on the land side in this type of construction job that you were doing there that day, isn't it true?

A. For seven years and a half I had charge, as I told you in the start, I told this attorney, of the barges and the tugboats, derrick barges, that built San Pedro Harbor.

Q. You would go out and get these barges when you needed them at the job after they had been moored by the incoming [44] tugs, is that not true?

A. Not necessarily. I said I had charge of them. I didn't do any of it personally. I had my men do it.

Q. You were in charge of crews?

A. That is right.

Q. You would do that, is that not true?

A. Yes, I was general superintendent.

Q. I understand you didn't actually do the job, but you superintended crews going out and getting these barges from the mooring and taking them in after they had been dropped by the incoming tug?

A. That is correct.

Mr. Scully: Thank you very much.

The Court: As I understand it, then, Mr. Jackson, this work at the San Pedro Harbor for the seven-and-a-half-year period that you mentioned, you not only had charge of the land part of the work, but you directed the tugs—

(Testimony of F. C. Jackson)

The Witness: Marine part of it.

The Court: —what to do?

The Witness: Yes, sir.

Mr. Toner: I have just a question or two.

Redirect Examination.

By Mr. Toner:

Q. Mr. Jackson, you testified that when you went out to look at Barge 4414 after she had been moored everything was [45] secure. Did you mean everything was apparently secure? A. That's right.

Q. Actually do you know whether everything was secure on that barge or not?

A. Only apparently. Everything looked all right.

Q. But from what happened later would you say it was secure? A. No.

Q. Was there any wind that night to speak of, if you remember?

A. If I remember correctly there wasn't much of a wind.

Q. Is there any substantial surge or current at the point in question?

A. Well, that is around in behind of the current. The current came in through the end of the breakwater around into the harbor. But in where it lays there is always more or less a surge. I mean an under-the-surface surge. I don't mean a top surge.

The Court: Mr. Toner has referred to a current and then to the surge; do you have in mind that they are one and the same, or that they are different?

The Witness: They are different.

(Testimony of F. C. Jackson)

Q. By Mr. Toner: Is there any surge there?

A. There is a slight surge every place. [46]

Q. And is there any current there?

A. Not much of a current there, no, sir.

Mr. Toner: That is all.

Mr. Scully: No further questions.

The Court: You are excused, Mr. Jackson.

The court will take a recess of a few minutes at this time.

(A recess was taken.)

Mr. Toner: Call Mr. Bach.

SOREN K. BACH,

called as a witness by and on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Soren K. Bach.

Direct Examination

By Mr. Toner:

Q. What is your address, Mr. Bach?

A. 1035 Cerritos Avenue, Long Beach.

Q. What is your present occupation?

A. I am a contractor.

Q. Carpenter contractor?

A. Carpenter contractor, contracting houses.

Q. By whom were you employed on March 31, 1945 and shortly thereafter?

A. Guy F. Atkinson Company. [47]

Q. What was your occupation at that time?

A. Yard superintendent.

(Testimony of Soren K. Bach)

Q. You will have to talk a little louder, Mr. Bach, so that counsel can hear you.

Are you now employed by the Guy F. Atkinson Company? A. No; I am self-employed.

Q. You are self-employed? A. Right.

Q. Did you have charge of the construction of certain mooring floats for the Guy F. Atkinson Company?

A. I did.

Q. Will you describe these mooring floats, their size, description, manner of construction?

A. They were assembled of 12 by 12's, 10-foot-long pieces, until we got a block that was either three layers high or four layers high, all according to the size of the mooring we wanted; bolted together with one-inch bolts. For the purpose of mooring we had a one-inch steel plate approximately I should say 20 by 20 inches, with a two-inch ring that had probably a width of 16 inches, and standing up about 12 inches.

The Court: Read the question and answer.

(The question and answer were read by the reporter.)

The Court: Did this ring that you speak of stand upright in the center of this steel plate? [48]

The Witness: Yes, your Honor.

The Court: How was that affixed to the mooring float?

The Witness: Your bolt is clear through. The same amount of ring on the bottom as it had on the top.

The Court: What was the diameter of that mooring ring?

The Witness: Diameter of the ring itself was two inches.

The Court: Was that of solid steel?

The Witness: It was solid steel, yes, your Honor.

(Testimony of Soren K. Bach)

The Court: Do I understand that that part which appeared above the top of the float was about 12 inches high?

The Witness: That's right.

The Court: And that was one-inch steel?

The Witness: Two inches.

The Court: And did that continue clear through the four feet of the bottom of the float and then protrude the same distance underneath?

The Witness: No; the ring itself was welded onto the plate and protruded two inches through the plate, and then it was welded on both sides of the plate, both top and bottom.

The Court: How was the plate then attached to the top of the mooring float?

The Witness: It was bolted with one inch bolts clear around the plate. I would say approximately 18 one-inch bolts that went clear through the float.

The Court: Clear through to the bottom? [49]

The Witness: Yes, clear through to the plate on the bottom.

The Court: Was there a similar ring that you have described attached to the bottom of it?

The Witness: Yes.

The Court: Was it attached in the same way?

The Witness: Yes, bolts go clear through and attach to the plates.

The Court: And the ring, as you have called it—some have referred to it as a "U" ring?

Mr. Toner: "U" bolt.

The Court: You mean the same thing?

The Witness: Yes.

(Testimony of Soren K. Bach)

The Court: It is more in the shape of a "U" bolt than it is a ring, isn't it, Mr. Bach?

The Witness: That's right.

The Court: And that is of the same construction as the one you have described topside of the mooring float?

The Witness: Yes, your Honor.

The Court: All right.

Q. By Mr. Toner: Mr. Bach, will you draw a diagram of the mooring float that was involved in the Barge 4414 accident?

Mr. Scully: Just a moment. It hasn't been shown that this witness knows what float was involved. He has been asked [50] thus far as to his building of floats. I think it should be brought home into the evidence, if it can be, that he knows what float is in question here.

The Court: Just ask him about it, Mr. Toner.

Q. By Mr. Toner: Mr. Bach, are you familiar with the float that was involved in the Barge 4414 accident?

A. I built the float, but I could not say for sure whether it was a three- or four-layer.

Q. If it is a three-layer, it is three feet high, is that it? A. That is right.

Q. And if it is a four-layer, it is four feet high?

A. Yes.

Q. Otherwise you can describe it exactly?

A. Yes, sir.

Q. You may proceed.

(Witness makes a drawing.)

The Court: How many of those bolts were there going through?

The Witness: Approximately eighteen. They were all around the plate. They went clear around. All one-inch.

(Testimony of Soren K. Bach)

The Court: Go ahead, Mr. Toner.

Mr. Toner: I should like to have the paper—

The Court: Show it to Mr. Scully.

Mr. Scully: I am familiar with it, your Honor. I watched [51] the witness draw it.

Mr. Toner: I should like to have the paper marked as an exhibit, and offer it as Libelant's Exhibit No. 2.

Mr. Scully: No objection for what it is worth, your Honor.

The Court: Let it be received and marked as Libelant's Exhibit 2.

(The document referred to was marked Libelant's Exhibit 2, and was received in evidence.)

Q. By Mr. Toner: Mr. Bach, if this mooring float is a three-foot float, how far out of water would it float?

A. At that time it was comparatively new, and I would say—

The Court: Is there any use in asking if it was a three-foot float? Hasn't it been stipulated it was four feet?

Mr. Toner: Yes, that is correct.

The Court: I don't see any use in taking time asking about three feet.

Q. By Mr. Toner: If this is a four-foot float, Mr. Bach, as it has been described, how far out of water would it float?

A. I would say about 18 inches out of the water.

Q. Did you have charge of the repairs to Barge 4414 after she was damaged on March 31, 1945?

A. I did. [52]

Q. Did you see the barge when she was capsized?

A. After she was capsized?

(Testimony of Soren K. Bach)

Q. Yes. A. Yes; after she was turned over?

Q. Yes. A. I did.

Q. Where was she at the time?

A. She was at the mooring when I saw her. Not at the mooring; I mean at the dock where we repaired the barges.

Q. Will you describe the damage that you saw, indicating the place and the planks that were damaged?

A. I saw two planks that were busted clear through, a hole that took in about two widths, or the width of two planks, and they were busted down between the floor timbers. That is about all.

Q. What was the size of these planks?

A. They were 4 by 12.

Q. They were 12 inches wide?

A. 12 inches wide.

Q. 4 inches thick? A. Yes.

Q. Where with reference to the bottom end of the rake were these broken planks?

A. I would say in about 21 feet or so, and away from the sides. That is taking it from memory now. I would say [53] about 5 feet or so.

Q. 5 feet from where?

A. From the side of the barge and in.

Q. Which side?

A. On the port side. It was upside down when she came in, now.

Q. Do you mean the port side upside down, or do you mean the starboard side rightside up?

A. On the starboard side upside down, and on the port side rightside up.

Q. In any event, the hole was 5 feet from the side of the barge? A. That is correct.

(Testimony of Soren K. Bach)

Q. Did you see any scratches or other marks on adjacent planks?

A. There were scratches—in my memory there was a scratch there that was approximately 8 feet long, as I recall it.

Q. In which direction did the scratch run?

A. It was not straight on the barge. It went like from the outside and come diagonally down to the hole.

Mr. Scully: Just a moment. May it please your Honor, might I have that answer read back again? If your Honor will permit me, I would like to stand over here, because I cannot hear. [54]

The Court: You may stand there, and you may sit at this other table, if you desire.

Mr. Scully: I am perfectly satisfied if this is all right.

The Court: Read the question and answer, please.

(The question and answer were read by the reporter.)

Q. By Mr. Toner: Was there anything, particularly, about the scratch that would enable you to determine what had caused the scratch?

A. Not on the scratch itself, but on the plank before where the hole actually was there was an indentment which you could see was made with a round object, and I just presumed that was the ring of the barge that did that.

Q. How large was this indentation that you saw?

A. You mean in the plank previous—

Q. How big was it and how deep was it?

A. I would say, as I recall, about three-quarters of an inch, maybe less.

Q. Deep?

A. Yes, in the edge of the plank that wasn't taken out of there.

(Testimony of Soren K. Bach)

The Court: I don't know whether this is clear or not. Read the last two or three questions and answers, please.

(The record was read by the reporter.)

The Court: Do you mean the ring of the barge? [55]

The Witness: No; the ring of the float.

The Court: Go ahead.

Q. By Mr. Toner: How far was it from the hole up to the mooring bit of the barge around forward of the rig?

The Court: Is that question clear to you?

The Witness: Yes. I was just trying to figure the distance.

As far as I can figure, it would be between 40 and 50 feet, it looked to me.

Q. By Mr. Toner: Was the barge's bottom clean?

A. Fairly clean, yes.

Mr. Toner: That is all.

Cross-Examination

By Mr. Scully:

Q. Mr. Bach, you described these floats which you built. Did you build all of the floats which were used at the mole job for the Atkinson people?

A. No, I didn't.

Q. Did you supervise their building?

A. Not all of them.

Q. How many floats were there there on the 31st of March, 1945, if you can recall?

A. I am afraid I couldn't give any figure on that. I would just have to completely guess.

Q. Two or four? [56]

A. No; I would say probably twelve.

(Testimony of Soren K. Bach)

Q. In use at the job there, along in front of the job?

A. Not laying out in that little area. I thought you meant in the whole harbor area of the Guy F. Atkinson Company.

Q. I mean the Atkinson floats.

A. About twelve.

Q. Did all of the floats that you built have identical construction, with the possible exception of three or four planks? Some were three and some were four, as I understand it. Other than that were they all identical?

The Court: I don't believe he said planks. I think he said some were three feet and some were four feet.

Q. By Mr. Scully: Other than the fact of some being three feet and some four feet, were the other dimensions identical? A. I believe they were.

Q. Could it be possible that there were different-sized "U" bolts used? A. That is possible.

Q. Roughly, I know you can't recall exactly, about how many floats would you say you have built?

A. I would say six.

The Court: All for the Atkinson Company?

The Witness: Yes.

Q. By Mr. Scully: Did each one of those, Mr. Bach, have [57] a "U" bolt standing clear of the topside of the float of about 12 inches? A. Yes.

Q. Every one of them did?

A. Yes, even the floats they brought in. They rented some from the Navy. They had the same "U" bolts on them.

The Court: Read the answer.

(The answer was read.)

Q. By Mr. Scully: Referring now, Mr. Bach, to the scratches that you observed and the indentations on the

(Testimony of Soren K. Bach)

hull, I will draw a rectangle which we will say is the bottom of the barge after she is turned upside down, and we will just pick out any place in here and put a mark which we will call "B-1" for the hole through that you saw.

Mr. Toner: If the court please, I think I would rather have the witness place the mark.

Mr. Scully: I am going to have him place it. This is preliminary. I just want to orient him on the map here. We are just placing that. We will put the bow over here.

Q. By Mr. Scully: Now will you take the pencil and indicate—

A. If I remember correctly, the hole was here (indicating).

Q. You may re-place it if you wish.

A. As I remember, approximately 8 feet. [58]

The Court: Talk a little louder.

The Witness: Approximately 8 feet. It run in a line about like this (indicating). That is about as I remember it.

Q. By Mr. Scully: A line running outboard towards the side?

A. Outboard, that is the way I feel I remember it.

Q. Will you point out where you saw this approximately three-quarter-inch indentation?

A. If we had, say, this plank here, or this hole here, this hole, if I remember right, was—

The Court: A little louder.

A. This hole, as I remember, was approximately like this (indicating); here was one plank here, and another plank here, and the indentation was right in the next plank here, which I did not remove at the time.

(Testimony of Soren K. Bach)

Q. By Mr. Scully: These planks ran across the bottom of the barge? A. That is right.

The Court: This hole, then, wasn't round, but rather elongated, is that it?

The Witness: Yes.

Q. By Mr. Scully: And bearing towards the outside of the float as distinguished from the bow—

A. Approximately the way I have got it here (indicating). [59]

Q. And this indentation appeared to you as though something had smacked the round object against the bottom of the boat? A. That is right.

Q. Did you see more than one of those—

The Court: The bottom of the boat?

Mr. Scully: Yes, your Honor, of the barge. We are looking at the barge capsized now, and the witness has testified that he saw this rounded indentation about three-quarters inches as though something had been jammed up against the bottom and driven part way into the plank.

Q. By Mr. Scully: Am I correct in that?

A. Right.

Q. Did you see more than one of those type of indentations? A. I did not.

Mr. Scully: We offer this, your Honor, as Respondents' A.

The Court: Let it be received and so marked.

(The paper referred to was marked Respondents' Exhibit A, and was received in evidence.)

Q. By Mr. Scully: You stated an estimate of what the measurement would be from the hole in the hull to the starboard bit, I believe it was, on the topside of the barge. Did you take into account that your measure-

(Testimony of Soren K. Bach)

ment would be at least partially along a circular course? [60]

A. That is what I was trying to figure out.

Q. You didn't use any mathematics or any figures in that?

A. No, I didn't. I figured I was on a 12-foot radius, approximately.

Q. 12-foot what? A. Radius of a regular barge.

Q. Do you recall which side of the barge the hole, the point of damage was nearer to? The port side or the starboard side?

A. The starboard side. That is with the barge right-side up.

Q. And about five or six feet inboard in the starboard side? A. That's right.

Mr. Scully: That is all, your Honor.

Mr. Toner: No redirect examination, your Honor.

The Court: You are excused.

Mr. Toner: Call Mr. Raimer.

EDWARD M. RAIMER,

called as a witness by and on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Edward M. Raimer. [61]

Direct Examination

By Mr. Toner:

Q. What is your residence, Mr. Raimer?

A. 2134 Golden, Long Beach.

Q. Your present occupation?

A. Superintendent on the Hyperion Outfall Sewer.

(Testimony of Edward M. Raimer)

Q. Who was your employer?

A. The Guy F. Atkinson Company.

Q. What previous experience have you had around the harbor, particularly with reference to mole and harbor construction.

A. I have been indirectly involved in the towing of rock for the past nine years, from the Catalina quarries to the Long Beach breakwater, and also to the mole job, and Reese Field, Redondo Breakwater, and Hueneme Jetty.

Q. What was your position on March 31, 1945?

A. I was assistant project manager on the mole job.

The Court: For whom?

The Witness: For the Guy F. Atkinson Company.

Q. By Mr. Toner: What were your hours of work?

A. Twenty-four, just about.

Q. What shift were you on?

A. I was responsible for the towing of the rock, and of course I was subject to call. However, my hours were, you might say, from 7:00 in the morning until 6:00 in the evening. [62]

Q. Where were you when Barge 4414 was damaged?

A. I was at home.

Q. When did you first hear about the damage to the barge?

A. Approximately 7:00 o'clock the following morning.

Q. When you came to the job?

A. When I came to the job.

Q. What did you see at that time?

A. Well, at that time I didn't see anything. They didn't have the barge turned, if I remember rightly, by that time. I am not certain of that.

(Testimony of Edward M. Raimer)

Q. Did you later see the damage to the barge?

A. I did.

Q. Where was she at that time?

A. She was moored alongside the work trestle.

Q. Was she capsized or rightside up?

A. She was capsized.

Q. What did you observe as to the damage she had sustained?

A. Two of the bottom planks were bashed in, approximately 21 or 22 feet from the rake, and approximately 5 to 6 feet in from the side of the barge.

Q. How large a hole— A. Starboard side.

Q. Did that make a hole right through the bottom of the [63] barge? A. That is right.

Q. How large a hole did that make?

A. It was a jagged hole, of course, and I imagine it covered approximately 6 to 8 square inches.

The Court: Read the answer.

(The answer was read.)

The Court: 6 to 8 square inches?

The Witness: That is the opening, yes.

The Court: Do you mean 6 to 8 square inches? Would you say 2 by 4 inches, is that what you mean?

The Witness: That is right. That much area.

The Court: 6 to 8 square inches was the hole?

The Witness: That's right, sir.

Q. By Mr. Toner: Did you make an examination of the damage? A. Yes, I did.

Q. Do you have an opinion as to the manner in which this damage was caused?

Mr. Scully: Go ahead.

A. Well, I was of the opinion that the damage was—

(Testimony of Edward M. Raimer) .

Mr. Scully: Just a moment.

Q. By Mr. Toner: Just answer yes or no whether you have an opinion. A. Yes. [64]

Q. Will you state that opinion?

Mr. Scully: Just a moment, Mr. Raimer. Counsel has not qualified this witness other than as a superintendent on a construction job and as a construction superintendent. This is a matter of marine damage to vessels, which is a much different thing than building moles and the like, and I submit the witness is not qualified to give his opinion on that.

Mr. Toner: If the court please, he has testified he was in charge of having the rock brought over to these various jobs from Catalina for a period of nine years. I think he is thoroughly qualified to testify as an expert.

Mr. Scully: Of course, your Honor, a man on a passenger liner might say he was in charge of bringing passengers over the route from Australia for many years, but he couldn't testify as to what the cause of grounding might be, or collision. That is entirely different. I still submit that the objection is well taken.

The Court: I think he should be qualified further.

Q. By Mr. Toner: Mr. Raimer, did you have, during the course of your experience, occasion to examine damage to various barges?

A. Yes, I did. That was part of my job. In other words, I had to provide for the dry-docking of barges that were seriously damaged, and also—

Q. Did you have charge of the maintenance of barges [65] similar to Barge 4414? A. Indirectly, yes.

Q. Have you examined various other damage to the bottom of similar barges?

A. Yes, I have examined damaged barges.

(Testimony of Edward M. Raimer)

Q. Was that part of your work during the nine years you referred to? A. That is right, sir.

Q. Will you state your opinion as to the cause of damage to Barge 4414?

Mr. Scully: Just a moment. May it please your Honor, I repeat my objection for the reason that all of that experience would give him very adequate knowledge as to how to repair them, but it would have absolutely no bearing as to what caused them. We have got issues here concerning seamanship, and the method of mooring barges and the like; not on matters of construction, the way to put in planks, or the type of materials used, and the way it is put together. That is all in the witness' field, but not the cause of damage. That is substantially different, your Honor.

The Court: The objection is sustained.

Q. By Mr. Toner: How did the size of the hole in the bottom of Barge 4414 compare with the "U" bolt in the mooring floats which were being used at that time?

A. The indentation could have been made by a bar the [66] size of the "U" bolt in our mooring floats.

The Court: Didn't you cover that in the stipulation?

Mr. Scully: Yes, there is no dispute about that.

Q. By Mr. Toner: Basing your answer upon your experience in harbor construction work, assume a barge similar in description, dimensions, draft to Barge 4414, loaded with 879 tons of rock with two to three feet of freeboard at the bow and six to eight inches of freeboard at the stern; assume further that said barge was properly moored to a mooring float similar in dimensions and description to the floats we have been talking about, and similar to the floats used on the Terminal Island mole

(Testimony of Edward M. Raimer)

construction job; and assume further that the wind was negligible, that the water was at or near high tide, and that the ordinary currents and surges of Los Angeles Harbor were present: state whether or not you have an opinion as to whether it is possible for such a barge to override said mooring float by the action of the wind and the currents without any intervening motive force.

Mr. Scully: Just a moment, may it please your Honor. I repeat my objection. It is the same question in the form of a hypothetical question now. The witness has already clearly shown the limits of the field of his qualification. He has no qualification on towing as such. He has qualifications for building barges, constructing barges, and building moles, and the like, but not the navigation of tugs in tow. [67]

The Court: The objection is sustained.

The court will take a recess at this time, Mr. Toner, until 2:00 o'clock.

I think you should further qualify this witness upon the point urged in the objection by Mr. Scully.

(Whereupon, at 12:00 noon a recess was taken until 2:00 o'clock p. m. of the same day.) [68]

Los Angeles, California, Tuesday, December 16, 1947.

2:00 P. M.

Mr. Toner: If the court please, Mr. Scully has obtained some tide information, which we are perfectly willing to stipulate may be read into the record.

Mr. Scully: May it please your Honor, I took this from the records of the United States Coast and Geodetic Survey in this building at the noon hour. Those records

show the actual recordation of the tides at Los Angeles Harbor on March 31, 1945, and the first two tides on April 1, 1945.

Low tide on March 31 was at 5:30 A. M. Daylight Saving Time, with a tide of .41 feet. High tide following—

The Court: Point what?

Mr. Scully: .41 feet. 41/100 feet.

High tide, following that low tide, or flood tide as it is also called, was at 11:42 A. M. on the 31st of March. It measured at 3.81 feet.

The next low tide on the 31st of March, 1945 was at 5:06 P. M.

The Court: Still on March 31st?

Mr. Scully: Yes.

The Court: What time?

Mr. Scully: Six minutes past five P. M. It measured at 1.41 feet.

The Court: The first low tide was 41/100 of a foot? [69]

Mr. Scully: Yes, 5:30 A. M. on the 31st.

The Court: April?

Mr. Scully: We haven't got the last tide on the 31st, your Honor, of March, which occurred at 11:30 P. M. on the 31st of March. It measured at 4.91 feet.

Now we go to the 1st of April. 6:12 A. M. Low tide .61 feet.

Although it probably will not be material to this inquiry, I do have the figures on the high tide following that on the 1st of April, which occurred at 12:30 P. M., 30 minutes past noon on the 1st of April. It measured at 3.61 feet.

Mr. Toner: It is stipulated by the libellant that those figures are correct.

Mr. Raimer.

EDWARD M. RAIMER,

called as a witness by and on behalf of the libelant, having been previously sworn, resumed the stand and testified as follows:

Direct Examination (Resumed)

By Mr. Toner:

Q. Mr. Raimer, will you explain to the court what your duties were in connection with the mole job, in detail, please?

A. Well, I was interested in any problem or course that would concern the management. However, I probably spent the majority of my time dispatching the towboats, chartering the towboats, surveying the barges after there had been an accident, [70] making out the report, getting dry-dock space for them in case we had to dry-dock them. We used to dry-dock them before we turned them over in order to do a repair job on them. In other words, I can only testify as to that which I—the information I would get from the field through the men, and from my own observances while making the surveys of the accident.

Q. What did you have to do with the mooring of the barges?

A. I was responsible for the tow, of course, from the time the boat left with the empty barges, went to Catalina, and the barges were loaded and then towed to the mainland, and responsible until they were made fast.

Q. What do you mean by you were responsible for them?

A. In other words, if there was an accident, towing accident, or a barge happened to lose a load, due to a marine accident, or due to a storm, why, it was up to me to come up with the answers as to what had happened.

(Testimony of Edward M. Raimer)

Q. Did you have charge of that feature of the job?

A. That's right.

The Court: He had charge of what feature, now?

Mr. Toner asked if you had charge of that feature. You had charge of what feature? When a tug was bringing in, say, a barge to be moored, did you have anything to do with that?

The Witness: Only in that I was responsible for the [71] tow, your Honor. In other words, if there was an accident chargeable to towing, why, that was my responsibility, to investigate.

The Court: Were you out there to watch them when they came in and made the barges fast to the floats?

The Witness: Quite often. In fact, I have been down in the holds when the barge has been sinking. Personally helped plug one hole while the barge was sinking.

The Court: That was after the collision or whatever it was that caused the hole—was there a hole in the bottom of the barge that caused it to be sinking?

The Witness: That's right, sir.

The Court: Were you in there at the time that it struck?

The Witness: No, sir.

The Court: You went there afterwards?

The Witness: That is right. I would hear, either by phone or radio, that the barge was in distress, and then I would get on a water taxi and—

The Court: When the tugs came in with their tow, did you have anything to do with the method of their being made fast to the floats?

The Witness: Well, only—of course that was a cut and dried method that we have used for years. I would

(Testimony of Edward M. Raimer)

order, say, for instance, the pendants made up that we anchored the barges with, and also the floats built, and also purchased the [72] anchors, and had the pendants made, that is at our rigging loft, gave them the sizes, of course, and the length needed for the anchor pendants and crown buoys, and anything connected with the mooring gear.

The Court: As I understand it, then, you had charge of the bringing in of the tows from outside into the harbor or to wherever they were moored?

The Witness: That's right, sir.

The Court: Were you on any occasions present at a time when tugs came in with their barges in tow and made them fast to the floats?

The Witness: Many times, sir, many times.

The Court: You might ask him more about that, Mr. Toner.

Q. By Mr. Toner: How many times would you say you were present at a time barges were moored?

A. Possibly one hundred.

Q. How many barges did you have on this job?

A. Well, now, I think we had about 14 barges. That wouldn't be off more than one or two barges.

The Court: Some of them were brought in every day?

The Witness: That is right.

The Court: Of course you weren't present every time each one of them came in?

The Witness: No, sir; but we tried to make—

The Court: When they did come in did you observe the [73] method used in making them fast to the floats?

The Witness: Quite often, yes, sir.

The Court: Go ahead.

(Testimony of Edward M. Raimer)

Q. By Mr. Toner: Was there any special method that was used to moor these barges?

A. There is only one method that I have ever observed. It is the same one. They come in, of course—

Mr. Scully: Just a moment, may it please your Honor. We are getting into custom, procedure and usage. Before the witness goes into the opinion evidence, which counsel is obviously going to ask him, I should like to ask permission to take the witness on voir dire, if I may have the privilege.

The Court: This objection is overruled. Read the question.

(The question and answer thus far were read by the reporter.)

Q. By Mr. Toner: Finish and describe the method.

A. They have a towing bridle attached to the barge in tow, that is, two pendants, the two pendants are fastened to a ring which is fastened to the towing line.

Q. Pardon me. Perhaps it would be simpler if you drew a diagram of a barge.

The Court: Don't we have enough barges there without having him draw any more?

Mr. Toner: I wanted it drawn on 'a little smaller scale, [74] because he describes a pendant.

The Court: Go ahead.

The Witness: These pendants are about 90 feet long, 90-foot pendants. They fasten to each bit, one to each corner bit on the bow of the barge, and then when the tow is brought in, of course the speed is cut down, and when it nears the mooring float one of the pendants is lifted, and then as it comes close enough to the float to get hold of the other pendant—sometimes if there happens

(Testimony of Edward M. Raimer)

to be a crew on hand, why we have a man on board the float, quite often we just use the pipe pole and lift the pendant off the float and secure it to the bit that they have taken the bridle off of. It all depends on which side of the barge the float happens to be on as to which bridle is removed. That is a ring there, and it fastens into the towing line (indicating).

Q. By Mr. Toner: Will you indicate where the bits are? A. The bits are right here.

Q. And one on the port corner?

A. Yes. (Indicating.)

Q. Have you completed your description of the mooring, Mr. Raimer?

A. Yes, that is right. After the bridle has been lifted the mooring pendant is slipped over the bit.

Q. Is it necessary for the barge to be at a complete stop for that operation to be performed safely? [75]

A. No. It is very seldom at a complete stop. I don't believe I have ever seen one.

Q. Is there any danger associated with mooring?

A. Well, if the barge is expelled at too rapid a rate the barge is liable to hit the mooring or override the mooring.

Q. What do you mean by override the mooring?

A. By overriding the mooring, if the barge happens to hit on the rake of the scow—

Q. You mean the mooring float hits on the rake of the scow?

A. If the barge—I mean if the mooring float hits the rake of the scow the barge is liable to pass over the top of the float.

Q. What is the danger if that happens?

(Testimony of Edward M. Raimer)

A. Well, when the anchor line becomes taut, of course your float will probably be—would be in a vertical position, that is, perpendicular to the bottom of the scow, and when the line becomes taut that will throw the top of the float into the bottom of the barge.

Q. Is that likely to cause damage to the barge?

A. Yes, it would, because you are towing in the neighborhood of 1200 tons there, plus the weight of your float.

Q. Did you examine the damage to this Barge 4414?

A. Yes, I did. [76]

Q. As a result of your examination do you have any opinion as to the cause of the damage?

The Court: Do you have some voir dire questions now?

Mr. Scully: I have an objection, your Honor, that this witness is not qualified. May I ask him a couple of questions to bring that out further?

Q. By Mr. Scully: Mr. Raimer, you testified before luncheon that your status was that of construction superintendent at the mole, I believe, was it not?

A. Assistant project manager.

Q. Assistant project manager? A. That's right.

Q. You have testified that you were responsible for the barges being towed from the time they started for Catalina empty, picked up a load of rock and came back to the job? A. That's right.

Q. So you were, in fact, responsible under your status and your duties and your job on the evening of March 31, 1945 for the Barge 4414, is that correct?

A. That's right.

Q. And you were, therefore, responsible not only when she entered the Los Angeles Harbor, but throughout the

(Testimony of Edward M. Raimer)

time that the Rocona took her to her mooring float in question? A. That's right.

Q. And thereafter? [77] A. That's right.

Q. Have you ever moored a barge of the type of 4414? A. Have I ever moored one?

Q. Yes, have you ever been aboard either the barge or the towing tug?

A. I have been on board the towing tug.

Q. Have you directed that operation?

A. I have never directed the operation, no.

Q. You stood by and watched it, is that right?

A. That's right.

The Court: You say you have never directed it yourself. What was your part there, Mr. Raimer? What were you doing there?

The Witness: To see that the operation was carried out properly.

The Court: Was it your responsibility and right if it were not being carried out properly to cause it to be carried out properly?

The Witness: Positively.

The Court: Go ahead.

Q. By Mr. Scully: Did you ever, in fact, give an order to the master of a tug engaged in a mooring operation of a barge?

A. Engaged in a mooring operation?

Q. Yes. [78]

A. I couldn't answer that. I have often told the towboat captains, of course, to go out and pick up a barge and moor it.

Q. Mr. Raimer, perhaps I didn't make myself clear. We are assuming now that tug "X" is in the act of bring-

(Testimony of Edward M. Raimer)

ing a barge up to a mooring float, preparatory to making fast to the mooring float; that involves certain maneuvers to the tug, doesn't it, and the barge?

A. That is right.

Q. Have you at that time under those circumstances ever given an order to the master of the tug engaged in that maneuver?

A. It was never necessary, sir. The towboat captains that were under our employ had been doing that type of business for years.

Q. And you left it up to them?

A. That is right, sir.

Q. It was their field of specialty, as it were, to do that job and do it properly?

A. Do it properly, that is right.

Q. And you relied upon them to do it, did you not?

A. If they did not do it properly, then of course we could take recourse.

Q. That was disciplinary action and discharge and so forth? [79]

A. Get another tug boat, yes.

Q. At that time and place under the towing maneuvers going on at the time of mooring a given barge, you looked to the towing tug master who was in charge of her to do that job properly, didn't you?

A. That is right, that is why we hire experts, sir.

Q. And you didn't consider yourself at that time authorized to give an order?

A. If an order was needed to be given, I would give the order, yes, sir. I had a perfect right to do that.

The Court: And you saw a great many of these barges brought in and moored?

The Witness: That's right, sir.

(Testimony of Edward M. Rainer)

The Court: Some of them while you were on the tugs themselves?

The Witness: That's right.

Q. By Mr. Scully: Were you ever aboard either the tug or a barge at time of mooring when she suffered damage from the float?

A. Not from the float, no, sir.

Q. Have you upon occasion observed barges overrun or go over the top, under some circumstances or other, a mooring float? Have you seen that done?

A. Personally I have never seen one pass over a float.

Mr. Scully: I submit, your Honor, this witness is still [80] a construction man and not a marine man.

The Court: Have you ever seen one after it had passed over a float?

The Witness: Yes, sir.

The Court: Under what circumstances?

The Witness: Have I ever seen a barge, you mean?

The Court: Where a barge has passed over a float while it was being attempted to be moored.

The Witness: No, sir, I haven't.

The Court: Any further questions, Mr. Toner?

Q. By Mr. Toner: Have you ever seen any damage to a barge caused by a mooring float?

A. This particular barge is the only one that I have ever seen.

Q. Have you ever seen any scratches on the bottom of a barge caused by a mooring?

A. I have seen scratches from what we believed has been the result of towing over the mooring float.

The Court: I don't believe he can testify to that question, Mr. Toner. He has described the jagged hole that

(Testimony of Edward M. Raimer)

has been made, and the size has been stipulated to by the plaintiff.

Mr. Toner: I believe he also testified that the hole was about the approximate size and shape of the mooring—

The Court: You have stipulated to that. [81]

Mr. Scully: We raise no point about that. I am willing to stipulate that it was so observed.

Q. By Mr. Toner: Mr. Raimer, basing your opinion on the examination of the damage to Barge 4414, will you state whether or not it is possible for this barge to have made the trip across from Catalina Island with a hole of that nature in her?

A. That would be impossible.

Mr. Scully: Just a minute, Mr. Raimer, please. I move that that portion of his answer go out, and that my objection be entered, your Honor, that this witness is not qualified to express an opinion on that matter.

The Court has already ruled on that field.

Mr. Toner: If the court please, I think the witness has seen many barges, he has been in charge of the towing operation, he was the man in charge of bringing these barges over from Catalina to this job, as well as to other jobs, I believe.

The Court: I think the answer may stand.

Q. By Mr. Toner: The answer was—

The Court: The answer is in the record. Just have the record read.

Mr. Toner: Will you read the answer, please?

(The question and answer were read by the reporter.)

Q. By Mr. Toner: Mr. Raimer, basing your opinion on your examination of the hole in this barge's bottom,

(Testimony of Edward M. Raimer)

will you [82] state what the possibilities are of the cause of such damage?

Mr. Scully: Just a moment, Mr. Raimer. I reenter my objection, your Honor. I think that is directly in the face of what your Honor observed, that this witness is not qualified to express an opinion as to causes.

The Court: I think it is the same question in another form, Mr. Toner.

Mr. Toner: This question is based upon his examination of this particular damage, rather than the previous question having been based upon his experience.

The Court: Wouldn't that be just a question that anyone could answer? That would be a question of physics, would it not?

We have here the description of the "U" bolt, we have a description of the hole; it doesn't require an expert, in other words, to answer that question. The objection is sustained.

Q. By Mr. Toner: Mr. Raimer, when Barge No. 4414 was loaded with 879 tons of rock, how much of the barge itself would be under water, assuming that she is on an even trim? A. Approximately 9 feet.

Mr. Scully: We have an agreement in our stipulation as to what the conditions were here concerning this barge. I don't think it is necessary to clutter the record. I am not really objecting to it, but I want to point out we have [83] covered the point and are losing ground here.

Mr. Toner: If the court please, that is not in the stipulation. The question is how much of the barge was under water, how deep did she ride in the water, what was her draft?

Mr. Scully: You mean the draft of the vessel?

(Testimony of Edward M. Raimer)

Mr. Toner: Yes.

Mr. Scully: I beg your pardon. I misunderstood.

The Court: You may answer it.

A. The barge at that time showed about three feet of freeboard in the bow and about 18 inches of freeboard in the stern, and the overall draft of the barge is 12 feet, so an average depth there would be approximately 9 feet, that is, 9 feet of barge was submerged.

The Court: Just explain what you mean by freeboard.

The Witness: Freeboard is that part of the barge that is above water level.

The Court: I think that, in substance, is covered in the stipulation, isn't it?

Q. By Mr. Toner: Mr. Raimer, do you know whether this barge was manned by any of the Guy F. Atkinson people at the time of the crossing?

A. There were no Guy F. Atkinson employees aboard the tow. It was a chartered towboat.

Q. Will you explain that, please? [84]

A. The towboat was rented or chartered from the Case Construction Company.

Q. And whose employees were on the towboat?

A. Case Construction Company's employees.

Q. By whom were they paid?

A. They were paid by the Case Construction Company.

Q. Did Guy F. Atkinson have any part in paying them?

A. No. Well, we paid a daily rate for the towboat.

Q. Do you know how much that rate was?

A. \$300 per day.

Mr. Toner: No further questions?

(Testimony of Edward M. Raimer)

The Court: I am just looking at this stipulation. It may be that the court's statement was in error about the freeboard.

Mr. Scully: I think the freeboard is stipulated to, your Honor. I don't think the draft was.

The Court: I thought I saw it in there, but I do not now see it. There is a statement of what the libelant claims as to the freeboard.

Mr. Toner: That is what the respondent claims as to the freeboard.

The Court: As to what the respondent claims, yes. But I do not see any stipulation of fact with regard to it.

Mr. Scully: I don't think we are far apart. I think we have both got the same items. Is that the way you under- [85] stand it?

Mr. Toner: Yes. This witness testified the freeboard was 18 inches at the stern, and I believe that respondent's position is it was 6 or 8 inches at the stern.

Mr. Scully: The net result is she was high at the bow and low in the water at the stern.

Mr. Toner: And she had 3 feet of free water at the bow, we both agree on that. Therefore she must have been about 9 feet below water at the bow.

The Court: I had that in mind when I said it was substantially stated in the stipulation of facts, but I want to be sure about it.

Mr. Toner: I have one more question.

The Court: Mr. Goldstein, turn back to the witness' testimony regarding the freeboard and the draft, and read it, please.

(The record was read by the reporter.)

(Testimony of Edward M. Raimer)

The Court: In other words, this statement you made, Mr. Raimer, about there being 1½ feet of freeboard on one end and 3 feet on the other, that is on the basis that with this load, and the boat was in trim as you all it—is that correct? Would it be that way?

The Witness: That is right, sir, the barge would have to be in trim. When you calibrate your carriage you take your calibrations from all four corners and average the [86] readings.

The Court: If she is riding properly the freeboard would be just about as you have stated, and the draft would be on an average of 9 feet?

The Witness: That is right, sir.

Q. By Mr. Toner: Did you have access to the records kept of the trips of these various barges?

A. Yes, I had all the logs.

Q. Did you examine the log with reference to the load of Barge 4414? A. Yes.

Q. And the records and the log of Barge 4414 are what you are basing your present testimony on, is that right? A. That is right.

Q. When Barge 4414 was so loaded and so trimmed was she seaworthy for a trip across the Catalina Channel?

Mr. Scully: Objected to, your Honor, as not within the field of this witness' knowledge as an expert. He is not a marine man and hasn't purported to be.

The Court: Well, there is some question about that, Mr. Toner. I don't think you had better proceed with that. While Mr. Raimer had general charge of these matters, he left the transportation to the master of the tug.

Mr. Toner: That is correct, it is a chartered transportation. [87]

That is all.

Mr. Scully: No cross-examination.

The Court: You are excused, Mr. Raimer.

Mr. Toner: I call Mr. Scheibe.

FRITZ A. SCHEIBE,

called as a witness by and on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Fritz A. Scheibe.

Mr. Toner: If the court please, I should like to offer the sketch that Mr. Raimer has drawn of the mooring bridle, towing bridle, as Libelant's Exhibit 3.

The Court: It may be received.

(The drawing referred to was marked Libelant's Exhibit 3, and was received in evidence.)

Direct Examination

By Mr. Toner:

Q. Mr. Scheibe, what is your residence?

A. Rolling Hills, California.

Q. What is your occupation?

A. Marine surveyor.

Q. How long have you been a marine surveyor?

A. Twenty years.

Q. What marine experience have you had in addition to the experience you had as marine surveyor? [88]

A. I have an unlimited master's license in steam.

Q. Did you on behalf of libelant examine Barge 4414 shortly after March 31, 1944?

(Testimony of Fritz A. Scheibe)

A. I examined Barge 4414 in the interest of the underwriter who had the barge insured at that time.

Q. Describe the damage, please.

A. May I refer to the report I wrote covering that accident?

Q. Yes.

Mr. Scully: Just a moment. May I ask the witness a question on voir dire as to that?

The Court: Yes.

Q. By Mr. Scully: Mr. Scheibe, would you be able to testify as to your observations and your knowledge of those facts independently and without reference to the report of survey?

A. State that again, will you please?

The Court: Read the question.

Q. By Mr. Scully: Can you tell your story without looking at the report of survey? Do you know what happened or what you saw, rather, without the report of survey to refresh your recollection?

A. I believe I could.

Mr. Scully: Proceed, counsel.

The Court: It is not necessary to show it to him if he [89] can do it.

Q. By Mr. Toner: Mr. Scheibe, will you describe the damage that you found to Barge 4414?

A. When I saw Barge 4414 it was in a capsized condition alongside of the dock at the mole, and there was a hole in the bottom, I believe, in planks No. 22 and 23 aft of the foreward rake, about 5 feet in from the star-board side of the barge.

(Testimony of Fritz A. Scheibe)

Q. Will you describe the approximate size and shape of this hole?

A. The hole was approximately 3 inches wide and extended through one complete plank, the width of one complete plank, and partly into a second plank.

Q. Are you familiar with the mooring—

The Court: I wouldn't know just how great the length was.

The Witness: The planks are 12 inches wide.

The Court: It would be just somewhat more than 12 inches long?

The Witness: Yes, sir.

Q. By Mr. Toner: Are you familiar with the mooring floats that were used on the Terminal Island mole job?

A. I only saw them laying in the water.

Q. Did you see a "U" bolt in the top of these mooring floats? [90] A. I did.

Q. Will you describe the hole in the bottom of Barge 4414 with reference to its similarity or dissimilarity to a "U" bolt such as you have described?

A. The hole that I saw in the bottom of the barge had the appearance of having been made by a "U" bolt.

Q. Were there any other marks or gouges or scratches on the bottom of this barge?

A. There were some marks extending forward on the barge from the hole toward the starboard edge of the barge. It appeared to be a groove caused by a round object.

Q. How wide was the groove?

A. From approximately 2 inches at the hole extending to nothing for a distance of 7 or 8 feet forward of the hole.

(Testimony of Fritz A. Scheibe)

Q. How deep was the gouge at its deepest point?

A. Where the hole was, the gouge was approximately a half inch to an inch deep.

Q. Mr. Scheibe, basing your opinion upon your experience as a marine surveyor, and upon your maritime experience, do you have an opinion as to the cause of the damage you saw in Barge 4414?

A. It was my opinion—

The Court: No. First answer it yes or no.

Q. By Mr. Toner: Do you have an opinion?

A. Yes. [91]

Q. State that opinion.

A. It is my opinion that the barge overrode a mooring float and that the eye—the “U” bolt punctured the bottom planking.

Q. Mr. Scheibe, do you have an opinion concerning whether or not it is possible for a barge to override a mooring float by the ordinary action of the wind and waves and currents and surges in the Los Angeles Harbor at that time and place?

A. Do I have an opinion?

Q. Yes. A. Yes, I do have.

Q. Will you state that opinion?

Mr. Scully: Object to the question on the ground not that the witness may not be qualified to give his opinion that he has as to the possible cause, but now when we delve into the realm of could it have been possible for it to happen in any other manner than such and such, I think we are going very much afield and into the field of speculation, and not getting credible evidence from a witness who is without question a reliable and qualified surveyor. I think we are asking him to stretch his field

(Testimony of Fritz A. Scheibe)

quite a bit when we ask him, could it be possible for anything else to happen.

The Court: Read the question, please.

(The record was read by the reporter.) [92]

The Court: Before he can answer that question, I think he would have to show that he knew what the ordinary operation of the wind and the waves and the surge was.

Mr. Toner: You see, if the court please, we have in our pre-trial stipulation the fact that the wind was negligible, and that the ordinary currents and surges of Los Angeles Harbor were present.

The Court: That may all be true, but there is an objection here as to the qualification of this witness to answer the question.

Q. By Mr. Toner: Mr. Scheibe, are you familiar with the ordinary currents and surges of the Los Angeles Harbor?

A. I am. I have a pilot's license for Los Angeles Harbor.

Q. How long have you been familiar with the currents and surges of Los Angeles Harbor?

A. Since 1926.

Q. Will you answer the question—

The Court: That ordinary condition, does it prevail generally throughout Los Angeles Harbor, Mr. Scheibe?

The Witness: Yes, sir.

The Court: This question is assuming that there were no unusual circumstances of wind or waves or current. Now will you put your question again, please, Mr. Toner?

Mr. Toner: I think I would rather have the question [93] read, if the court please.

(Testimony of Fritz A. Scheibe)

The Court: If Mr. Goldstein can find it.

(The following question was read by the reporter:

“Mr. Scheibe, do you have an opinion concerning whether or not it is possible for a barge to override a mooring float by the ordinary action of the wind and waves and currents and surges in the Los Angeles Harbor at that time and place?

“A. Do I have an opinion?

“Q. Yes. A. Yes, I do have.

“Q. Will you state that opinion?”)

The Court: The objection is overruled. You may answer it.

A. With the ordinary and usual conditions of the current and tide and surge in the harbor, the barge would not override that float or similar floats.

Q. By Mr. Toner: Why not?

A. There is not enough force with either the wind, the tide, or the surge to force that barge over a float of that size.

The Court: Would there be enough force with the combination of all in the same direction to do it?

The Witness: Not with the usual winds and tides and surges. [94]

The Court: That is what the question is, just the usual. It does not refer to any unusual conditions.

Q. By Mr. Toner: Would it take some additional force or motive power to bring this barge up on a mooring float such as we have been describing?

A. It would.

(Testimony of Fritz A. Scheibe)

Q. Will you describe what happens to a barge similar to Barge 4414 when she gets a hole in her the size and shape that you observed?

A. When a barge is loaded, such as this one is reported to have been loaded, and water leaks in, it becomes free water in the barge. There are no solid bulkheads to shut it off and to keep the water in one particular section. It results in all the water going to one side of the barge. When there is sufficient water in the barge to list her over, part of the load will slide off. The barge will then roll in the opposite direction, the water will run to the opposite side, and probably the remainder or a good part of it will slide off on the other side, until the barge comes back into an upright position.

Q. About how long would it take for a barge similar to Barge 4414 to begin to list after she received damage such as you observed?

A. Approximately a half hour,—

Q. Would it make any difference if the "U" bolt — [95]

A. (Continuing) —to an hour.

The Court: Read that.

(The answer was read by the reporter as follows:)

"Approximately a half hour to an hour."

Q. By Mr. Toner: Half hour to an hour?

A. Yes.

Q. Would it make any difference if the "U" bolt remained in the hole?

A. Yes, the hole would be partially plugged.

Q. Assume that Barge 4414 was loaded with 879 tons of rock, and so trim that she had 2 to 3 feet of freeboard at the bow and 6 to 8 inches of freeboard at the stern,

(Testimony of Fritz A. Scheibe)

do you have an opinion as to whether such a barge would be seaworthy for towing across Catalina Channel?

A. Yes, she would be seaworthy.

Q. Would such a barge be seaworthy for mooring to these mooring floats? A. Yes.

Q. Would it affect your answer any if the freeboard figures were changed to 3 feet at the bow and 18 inches at the stern? A. No.

Q. From your examination of the damage to the bottom of Barge 4414 would it have been possible for that barge to have made the trip from Catalina Island with such damage [96] existent at the time she left Catalina Island?

A. It is my opinion that she couldn't have made that trip.

Q. How long does it take a barge to be towed from the harbor entrance to the mooring float at the mole job?

Mr. Scully: Just a moment, may it please your Honor. I must object to that question on the ground of indefiniteness. You could have a very fast tug, you could have a very slow tug; you could have a direct route taken or an indirect route taken. The map shows two entrances. We don't know which route was taken according to Mr. Toner's assumption in his question.

The Court: The objection is sustained.

Mr. Toner: I believe that is all.

Cross-Examination

By Mr. Scully:

Q. Mr. Scheibe, you expressed the opinion that it would not be possible for Barge 4414 as Mr. Toner described it to you to get on top of the mooring float; is that a correct statement of the opinion you expressed?

(Testimony of Fritz A. Scheibe)

A. Under ordinary circumstances?

Q. Yes, under ordinary surge and currents, and the wind being negligible. A. Yes, that is my opinion.

Q. Would it alter your opinion if added to the [97] circumstances upon which you based the other opinion were the fact that the anchor chain on the float were such as to bring that float below the water surface at some time or another, would that alter your opinion?

Mr. Toner: If the court please, I should like to object to this question in view of the fact that it is interposing an entirely new fact that has not been brought into the picture. I have no serious objection, assuming that counsel is going to establish such fact.

Mr. Scully: It is a fact tendered by the pleadings; and, furthermore, I am merely testing the witness' qualifications as an expert on that opinion. I think it is proper cross-examination, your Honor.

The Court: It is overruled.

Q. By Mr. Scully: Do you understand the question, Mr. Scheibe?

A. Will you repeat the question, please?

The Court: Read it, please, Mr. Goldstein.

(The following question was read by the reporter:)

"Would it alter your opinion if added to the circumstances upon which you based the other opinion were the fact that the anchor chain on the float were such as to bring that float below the water surface as some time or another, would that alter your opinion?"

The Witness: My opinion was based on normal conditions [98] with the float on the water.

(Testimony of Fritz A. Scheibe)

Q. By Mr. Scully: Yes.

A. Had the anchor chain been too short with that float submerged, then anything could happen.

Q. She could possibly get afoul of that "U" bolt, couldn't she?

A. Definitely that float would be under water.

Q. Did you see that float after the time of this accident, Mr. Scheibe?

A. No, sir, I did not.

Q. You just inspected the hull damage?

A. Yes, sir.

Q. It is reasonable to expect, is it not, Mr. Scheibe, that in making the voyage from Catalina to the place where Barge 4414 was loaded, under the conditions that you have been told she made that trip with 879 tons of rock aboard, that she would inevitably take some water?

A. Every wooden barge has a certain amount of slight leakage.

Q. This was a relatively new barge, wasn't it?

A. The barge was built either in 1943 or 1944. 1944, I believe.

Q. You as a marine man, as a surveyor, and knowing the age of ships and so forth, would consider her a relatively new craft, wouldn't you? [99]

A. Yes, sir, I would.

Q. And it is true, is it not, that new craft are not always tight at the seams?

A. There were three barges, 4414, —15, —and —16, that were all built at the same time, and they were tight. I went inside of them for a period of six months after they were launched, and they were tight.

Q. I am not claiming this was a leaky barge, or anything of the sort, or that it was in a leaking condition. I am asking you this question as an expert, Mr. Scheibe,

(Testimony of Fritz A. Scheibe)

and I want to know whether it is or isn't true that a relatively new craft of the age that you observed 4414 to be can possibly be somewhat loose at the seams, much more so than one that has been in the sea for some time.

A. No.

Q. They are always as tight as the older craft, are they?

A. The older craft leak a good deal more than the newer craft.

Q. If there is green material in a new craft, does that have anything to do with the tightness of the seams?

A. Depending on the condition of the material when it was put in the barge and when the barge was built.

Q. If it was in improper condition you might have some loose seams? [100]

A. Yes. I happen to know this barge when it was built, and it was fairly well seasoned before it was launched.

Q. I am sure it was. The taking of water on the voyage that I referred to as being possible, I didn't mean through the seams, Mr. Scheibe. It is not unusual at all for a rock barge making that voyage at that time of year to take some water over the gunwale, is it?

A. That is right.

Q. Over the side?

A. That is right.

Q. So that it is entirely probable that this craft arrived at her destination, the mooring block, carrying some free water in her hold?

A. Very probable.

Q. It is not only likely, but you say probable?

A. Yes, some.

Q. And it is true, also, is it not, that the surge of the sea on a craft dead in the water—I mean by dead in

(Testimony of Fritz A. Scheibe)

the water, as you clearly understand, without making any headway—a craft dead in the water, under the ordinary conditions of tide and current and wind negligible at the time that we are talking about there at the Los Angeles Harbor, with some free water in her hold, would be more affected by the surging process and the shifting of the water back and forth as free water, than if she were under way, [101] is that not true?

A. That would depend on circumstances. Under way she might be in a worse sea than the surge would be.

Q. In a worse sea, yes.

A. There would be more sea, and the free water would move around more and have a tendency to go to one side quicker than in a surge.

Q. Let us suppose that Barge 4414 was being towed in the outer harbor where we didn't have any sea to speak of, nothing as mariners know sea, she was making some way, would she not be less affected by free water in her hold than if she were dead in the water under those conditions of surge?

A. That would depend on the amount of free water in her. A couple of inches of free water over the entire bottom of the barge wouldn't make much difference.

Q. I am having difficulty making myself clear, because I am a landlubber, Mr. Scheibe. I am trying to get at this: Won't the free water in the hold swish back and forth more?

A. In the surge?

Q. If she is dead in the water, in the surge?

A. No.

Q. It will shift just as much if she is under way, or if she is dead in the water, making no difference at all, is that right?

A. It will move more when she is under way. [102]

(Testimony of Fritz A. Scheibe)

Q. In which direction?

A. Depending on the angle that the barge is being moved through the sea.

Q. Depending on the surge too?

A. The sea and the surge, yes.

Mr. Scully: That is all.

Redirect Examination

By Mr. Toner:

Q. Mr. Scheibe, counsel—

The Court: Before you ask any question, both Mr. Scully and Mr. Scheibe used the word "surge," depending on the surge. I think I have an idea what the surge is, but will you explain just what you have in mind, Mr. Scheibe?

The Witness: Surge, so-called, in Los Angeles Harbor, the official name for it is seiche, it is a condition that originates out in the ocean, far out in the ocean, just where or how they don't know, but it is a continuous movement of the water. The volume of water comes in like a swell, not a complete wave, but a swell, and comes in, and they come in regular succession, and when the weather is bad out at sea the surges will become larger. As the weather moderates, and sometimes two or three days after a storm, then the surge begins to subside.

The Court: But there is always this surge?

The Witness: A certain motion in that water, yes. [103]

The Court: And that originates out in the ocean?

The Witness: Yes, sir.

The Court: That is what I thought was meant.

The Witness: It is different from a wave.

The Court: Is that sometimes called a ground swell?

(Testimony of Fritz A. Scheibe)

The Witness: Yes, sir, that is a ground swell. However, a ground swell can also originate from high seas further out at sea.

The Court: Go ahead.

Q. By Mr. Toner: How much effect would that have on Barge 4414 loaded as she was with 879 tons of rock?

A. The surge?

Q. Yes.

A. It would have a tendency to make the barge move back and forth with the surge.

Q. How much?

A. Depending on the size of the surge.

Q. Let's assume a normal surge.

A. Anywhere from 5 to 10 feet.

Q. Is that the lateral distance? A. Horizontal.

Q. Horizontal distance? A. Yes.

Q. Would the surge have a tendency to make the barge move up and down? [104] A. Yes, it would.

Q. How much?

A. With a loaded barge it wouldn't be very much; it would be some.

Q. In feet or inches?

A. A few inches with the barge loaded.

Q. This lateral or horizontal motion of 5 feet or so, is that alternately or reciprocating back and forth?

A. I would like to explain it this way: A vessel laying in the surge would move with the surge, and as the surge passes the vessel the vessel has a tendency to go back to original position. Eventually, however, it will move some with the surge, some small distance each time. If the barge was loose or a ship or anything, it would eventually drift away from that position with the surge alone.

(Testimony of Fritz A. Scheibe)

Q. What is the effect of a surge on a properly moored barge?

A. It would have a tendency to make it move back with the surge until it came up on the line, and then it would drop back and the mooring line would become slack.

The Court: Mr. Scheibe, the surge, if I understand your answers, would cause the vessel heavily laden as this one was to move a few inches upward and downward.

The Witness: Yes, sir.

The Court: Would it have any other movement? [105]

The Witness: It would move with the surge.

The Court: If the surge were forward from the bow, that is, the direction of the surge was from the bow toward the stern, would there be any lateral movement?

The Witness: Yes, sir, with the direction of the surge. If the barge is moored so that the bow is toward the surge, the barge would move back with the surge, and then as the surge passed it would come forward again.

The Court: But its upward and downward movement would only be a few inches?

The Witness: That is right.

Q. By Mr. Toner: Would the surge have a tendency to stretch the barge out to the length of the mooring pendant? A. Yes, it would.

Q. So that the mooring pendant would be extending out from the mooring block—is that what you mean?

A. That is right.

Q. And would the surge have a tendency to extend the mooring block away from its anchor?

A. Depending on the weight of the chain or wire that was used from the mooring block or the anchor, it

(Testimony of Fritz A. Scheibe)

would stretch it out some, but the weight of the anchor or the chain or the wire would affect that, the amount.

Q. What is the proper length of mooring wire from the mooring blocks, such as has been described, to the anchor? [106]

The Court: Is this a matter of redirect examination?

Mr. Toner: Possibly not, if the court please.

Mr. Scully: I have a further objection to it, your Honor. It is not within the issues on trial.

Mr. Toner: I don't think it is particularly material at that, if the court please. I have one question.

The Court: If it is an important question, whether it is properly redirect or not, I think you should be allowed to ask it. But it didn't occur to the court that it was a matter that was redirect examination.

What did you have in mind, Mr. Toner?

Mr. Toner: I had in mind the issue that respondent had presented. that the mooring float was, possibly, not seaworthy, or not a proper mooring float, and I wanted to go into the question of whether or not a 75-foot anchor line was a proper line.

The Court: I think that would be a matter of rebuttal testimony. Will Mr. Scheibe be available for that purpose?

Mr. Toner: He says that he has three vessels that are in trouble down in the harbor and he wants to leave as soon as he can.

The Court: You might ask him, then.

Q. By Mr. Toner: Mr. Scheibe, is it proper to have a mooring cable 75 feet long on a mooring float such as we have been discussing? [107]

A. A mooring cable from the float to the barge?

(Testimony of Fritz A. Scheibe)

Q. From the float to the anchor.

A. It depends upon the depth of the water, the length of the mooring cable.

Q. How deep is the water there?

A. I don't know, except by—

Q. At the point indicated by Mr. Jackson.

A. Except by reference to a chart.

The Court: He stated it was 28 feet.

Mr. Toner: Very well.

Q. By Mr. Toner: Assume that the depth of the water was 28 feet, Mr. Scheibe—

The Court: Did he say at low tide?

Mr. Toner: Yes.

Mr. Scully: He said that was his best guess. He never measured it.

Q. By Mr. Toner: Assume that the depth of the water was 28 feet at low tide, would you say that a 75-foot anchor cable was proper?

A. I would say it was sufficient.

The Court: What about the cable from the top of the float? Is there any customary length for that, Mr. Scheibe, or not?

The Witness: Different people use—

The Court: They vary? [108]

The Witness: They vary according to conditions they are working under.

The Court: It should be long enough at least to make it safe to use it?

The Witness: To handle it, yes, sir.

The Court: Then outside of that it is more a matter of the strength of the cable and the opinion of the man in charge, is that correct?

(Testimony of Fritz A. Scheibe)

The Witness: Yes, sir.

Q. By Mr. Toner: Mr. Scheibe, you testified that there was some water that will be taken by a barge of this nature through the seams. How much would you say that Barge 4414 would normally be expected to take on a channel crossing? A. I can't say.

Q. Would it be much or little?

A. It would be a very small amount.

The Court: That is through the seams?

Mr. Toner: Yes.

The Court: It would be a very small amount through the seams.

Q. By Mr. Toner: Assume that the wind was negligible and that the—

The Court: What about the other method, through the gunwales I believe he said? [109]

The Witness: Over the deck. It would be the same problem there. If there were any seams that were leaking slightly there might be some leakage through there.

The Court: I thought you asked another question.

Mr. Scully: You don't have water coming through the seams when you have it coming in over the top?

The Witness: If there are any slack seams there would be a certain amount of leakage.

The Court: Would there have to be leaky seams before there could be any water coming in there, or would some come over the top, as Mr. Scully asked about?

The Witness: If I may explain it this way: Every wooden vessel works to some extent. This one had approximately 900 tons of rock on it, therefore there were certain stresses set up in the structure of the barge which would cause it to work, and the seams are the only place

(Testimony of Fritz A. Scheibe)

that there are openings. These are caulked with oakum. By the working of the barge this oakum would become loose and water will seep through the seams.

The Court: Would any water in the course of coming across from Catalina come over the deck of the barge?

The Witness: Yes, sir, depending on the weather conditions, the amount of water, there will always be some spray and some water coming over the deck of the barge.

Q. By Mr. Toner: Assuming that the wind was negligible [110] and the trip was without incident, would you say that sufficient water would have come in through the seams and over the sides to make any difference in the trim of the vessel, any substantial difference in the trim of the vessel? A. No.

The Court: Mr. Toner, you say through the seams and over the sides.

Mr. Toner: The accumulation of water.

The Court: According to Mr. Scheibe, if I understand him correctly, the water could only come into the hold of the vessel through the leaky seams.

The Witness: There are seams on the top, on the sides, and on the bottom.

The Court: No matter how it came over the top, at the sides, or at the bottom, it could only get in there through leaky seams, is that correct?

The Witness: That is right.

The Court: That makes it clear.

I thought from Mr. Scully's question there might have been some other way of getting in there, and then you said through the seams and over the sides. I thought you had in mind some other way.

(Testimony of Fritz A. Scheibe)

Mr. Toner: Frankly, I thought Captain Scheibe indicated that some water would splash over onto the rock and get into the bottom. [111]

The Court: It could, but even then it would have to go over the sides to go through the seams.

The Witness: Yes. There are hatches in these barges, but they should be closed and sealed before they leave Catalina.

The Court: Then they would have the same function in keeping out the water as the—

The Witness: Caulking of the seams.

The Court: Caulking of the seams would?

The Witness: Yes.

Mr. Toner: That is all.

Recross Examination

By Mr. Scully:

Q. Mr. Scheibe, on counsel's redirect you replied that with the surge the craft might be pulled back away from the mooring float, and the mooring line become taut. When the surge reversed itself you would get scope in the rack or get slack there, and it would come towards the mooring float, wouldn't it? A. Yes.

Q. So that the surge action upon the barge would not assure us that at all times the barge would be off and away from the mooring float while at anchor? There might be times when she would be up against this mooring float, depending on the surge of the sea, isn't that correct? [112]

A. The surge, the wind and the weight of the mooring wire?

Q. Yes, the whole combination of things.

A. That is right.

(Testimony of Fritz A. Scheibe)

Q. The extent to which the mooring float might come in contact with the barge hull, and the point at which she might come in contact with the barge hull, could be affected by the amount of freeboard at the bow, could it not? A. When the barge is loaded?

Q. Yes.

A. It would come in contact with the bow.

Q. And the point on the bow at which she would come in contact, the point on the rake at which she would come in contact would be dependent upon the amount of freeboard on the barge, isn't that true?

A. That is right.

Mr. Scully: That is all.

The Court: But if there is only 3 feet of freeboard on the bow, the float if not submerged would not strike below that 3 feet on the rake, would it, Mr. Scheibe?

The Witness: No, sir, it wouldn't.

Mr. Toner: Pardon me, if the court please. I think the court is mistaken. Three feet of freeboard is what is out of water, and there is 9 feet below water.

The Court: That is what I had in mind. If it is 3 feet [113] above the water, and the float is not submerged, then it couldn't strike the bottom of the barge. That is what I had in mind.

Q. By Mr. Scully: But if the anchor chain was too short it could strike the bottom of the barge, couldn't it, because the float would be held down below the surface of the water on a short chain?

The Court: I think he answered that. I think that is a matter of—

Mr. Scully: Our proof, I think.

(Testimony of Fritz A. Scheibe)

The Court: It may be, but it seems to me it would not require an expert. If the float is submerged, it would be a submerged factor there, or element, and if the boat comes over it, it would depend on how much it was submerged as to where it would strike. It might be submerged so much that it would clear under the bottom.

Mr. Scully: It would be one of those self-evident facts.

The Court: I have a great deal of difficulty in expressing what I have in mind in regard to trying to use these terms, because I do not have enough of these cases to be very familiar with them.

Q. By Mr. Scully: Did you ever see this float, Mr. Scheibe?

A. I probably did, but I couldn't identify it positively. [114]

Q. You have no independent recollection of it?

A. Not this particular float I wouldn't have an independent recollection of it.

Q. What would moss all over a mooring float mean to you?

A. That it had been in the water a long time.

Q. Submerged? A. Not necessarily.

Q. Does sea moss accumulate on portions of things that are not submerged at one time or another, that are always free of the water surface?

A. Not when they are always dry.

Mr. Scully: Thank you.

The Court: You are excused, Mr. Scheibe.

Mr. Toner: May I address counsel, through the court, and ask if Mr. Scheibe can now leave?

Mr. Scully: As far as I am concerned he may.

Mr. Toner: I can get him back to his business, then.

The Court: Have you any further witnesses?

Mr. Toner: Libelant rests.

The Court: The court will take a recess at this time.

How many witnesses have you?

Mr. Scully: I have three, your Honor. I have the master, the man who did the mooring, and one of the assistants aboard the tug. [115]

The Court: How long will your next witness take?

Mr. Scully: I suspect about half hour on direct, your Honor.

The Court: The court will take a recess of a few minutes at this time.

(A recess was taken.)

E. A. REEVES,

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Scully:

Q. Will you state your name, occupation, and residence?

A. E. A. Reeves, 1515 East Artesia Street, Long Beach, operator of a towboat, have been for several years.

Q. Just keep your voice up.

Mr. Toner: For several what?

The Witness: Several years.

Q. By Mr. Scully: For how long have you been the operator of a tow boat, Captain?

A. I believe in '38, the last part of '38.

(Testimony of E. A. Reeves)

Q. What licenses do you hold with reference to Los Angeles Harbor?

A. I have an unlimited pilot's license for any tonnage.

Q. On March 31, 1945, were you the master of the tug Rocona? [116]

A. Yes, sir.

Q. And who else was aboard with you?

A. Tom Gentle, deckhand; Rudy Tomasic, deckhand; and the engineer was down below.

Q. What is his name? A. Budreaux.

Q. Budreaux? A. Yes.

Q. Prior to March 31, 1945, had you had occasion to navigate Los Angeles Harbor in the operation of the tug Rocona?

A. Yes, sir.

Q. For about how long?

A. Well, I was on the Rocona around seven months. I had been on all of their tugs.

Q. In and about Los Angeles Harbor?

A. Yes, always.

Q. Had you towed barges similar to Barge 4414?

A. Yes, sir.

Q. And loaded with rock? A. Yes, sir.

Q. Had you moored those barges? A. Yes, sir.

Q. On March 31, 1945, did you have occasion to take on a towing engagement of Barge 4414? [117]

A. Yes, sir.

Q. Where and about what time of that day?

A. As near as I recollect I left Catalina around 1:30 P. M., I cleared the east entrance coming into Long Beach Harbor around 11:30 P. M.

Q. How many tows did you have, how many barges did you have in tow at this time?

A. I had two barges, sir.

(Testimony of E. A. Reeves)

Q. What was their cargo? A. Rock.

Q. Will you describe the trim of the Barge 4414 as you left Catalina Island?

A. Yes, sir. She was loaded rather light in the bow and I imagine she had between $2\frac{1}{2}$, 3, or $3\frac{1}{2}$ of free-board in the bow, and anywhere from 10 to 20 inches in the stern.

Q. You mean by those measurements that is the amount of the craft that was above the water's edge, is that right? A. Yes, sir.

Q. Was the other barge loaded about the same?

A. I don't remember exactly, but we commented on this 4414 by her being loaded light in the bow. They usually load them down heavier than that.

Q. Was that an abnormal loading condition?

A. It was out of the ordinary, because they did want [118] the rock over there as quick as they could get it. It was during the war.

Q. Who loaded the Barge 4414 with the rock?

A. A quarry on the east end of Catalina Island.

Q. Under charge of Atkinson, the people here?

A. Yes, sir, I believe so.

The Court: The tug had nothing to do with the loading?

Mr. Scully: No.

Q. By Mr. Scully: You had nothing to do with the loading, did you? A. No.

Mr. Toner: That is conceded.

Q. By Mr. Scully: You had no difficulties or unusual incidents on the voyage over? A. No, sir.

(Testimony of E. A. Reeves)

Q. Will you describe what you did and what you saw as you entered the harbor with those two barges in tow on the 31st of March, 1945?

A. As I came through the east gate, after I came through—

Q. Just a moment, Captain. If you wish you may refer to this chart. Do you recognize the chart?

A. Yes, sir. After I came through the east entrance en route from the mole, the tug *Dispatch*, I believe it was, came out and took one barge from me and left me with the [119] 4414. I shortened my wire, my tow wire, and proceeded up to the most westernmost mooring block, and I believe it was the only one that was empty. I am not sure of that. And I came up to the mooring and made the usual landing, nothing out of the ordinary. To me everything was all right.

Q. Now, just a moment, Captain. After you turned over the other barge to the tug *Dispatch* No. 2, to what extent did you shorten your line on 4414?

A. I imagine I had out between 30 and 40 feet of wire, enough to clear the bridles.

Q. Enough to clear the bridles?

A. Yes, sir, so the bridles wouldn't drag on the stern of the boat.

The Court: When you speak of the bridles, what do you mean?

The Witness: The two towing pendants that connect the bridle.

Mr. Scully: One of libelant's witnesses testified to the triangular condition of two pendants to a ring.

(Testimony of E. A. Reeves)

Q. By Mr. Scully: The line is from that ring to the tug, is that correct, Captain?

A. Yes, it is a shackle.

Q. At the time you made the transfer of the other barge to tug Dispatch No. 2, do you know to what extent, if any, Barge 4414 lost headway? [120]

A. Always within a thousand feet from a mooring block you slow down to a dead slow, and we did that, and come up to the mooring block very slowly.

Q. I am speaking of at the time that you cast off the other barge and delivered her to Tug Dispatch No. 2, did either or both barges lose their headway at that point?

A. Yes, sir, you have to come to a dead stop before you can throw the pendants off the after barge.

Q. If you know, were they both dead in the water at that time?

A. They were almost dead in the water, or the men couldn't get enough slack to throw the pendants off.

Q. How far did that operation of turning over the other barge and shortening your line on the 4414, how far away did that occur from the mooring float to which you secured 4414 later?

A. I don't remember just exactly. I couldn't say just how far off it was. But it was after I came up on the approach to the mole. I don't recall just where they did take it.

Q. Did someone board the barge at any time before you completed your mooring?

A. No one other than the man I put aboard.

Q. Who was that? A. Rudy Tomasic. [121]

Q. When did you put him aboard Barge 4414?

A. Long before I came to the mooring.

(Testimony of E. A. Reeves)

Q. Was it before, at the time of, or after you turned the second barge over to the Dispatch No. 2?

A. It was after I turned the other barge over to the Dispatch No. 2.

Q. Will you describe the process by which you put him aboard, insofar as the maneuvering of the Rocona?

A. I slowed down and pulled the tug over to the starboard side and backed down and let the stern of the tug come very easy to the barge and he stepped aboard with a pipe pole in his hand.

Q. Do you have a recollection as to how far that was away from the mooring float when you did that?

A. I think it was around a thousand feet.

Q. Was this mooring float designated to you as one of the mooring floats to which you should secure this Barge 4414?

A. They had three floats out there, and we could tie it to any of them that were empty.

Q. They were all Atkinson floats? A. Yes, sir.

Q. When you took your tow at Catalina what were your instructions as to the delivery of those barges, where and to whom? [122]

A. Tow them into the Long Beach mole and secure them to the moorings off the mole at the Atkinson job.

Q. Who gave you those instructions?

A. They were orders at all times. Those orders stayed in effect. We didn't get them each time we made a trip. We had those orders all the time.

Q. From whom was that? From the Atkinson Company?

A. We got our orders from Case Construction Company.

(Testimony of E. A. Reeves)

Q. Did you see this float as you approached it?

A. Yes, sir, I put the spotlight on it.

Q. Was that a hand spotlight or one aboard the ship?

A. One aboard the tug.

Q. Do you happen to know its power?

A. No, sir, I don't. It is a fairly good light.

Q. What did you do then when you picked it out after you had Tomasic aboard the barge?

A. I came up towards it very slow, slow as the engine would run without stopping, and I shut the power off before I even come to the mooring with the tug; had slack in my line between the tug and the barge, and I would say 100 feet from the mooring block I kicked the stern of the tug off the port side of the barge and backed down and laid alongside of the barge, but taking no strain on it, in a position to back down and check the headway of the barge if she had headway, and let the barge drift up to the mooring. [123]

Mr. Scully: Does your Honor understand the witness' testimony? That is, what his maneuvers were? He used a bit of seaman's language.

The Court: Yes, I think so. I believe it is clear.

According to his statement he came up there slowly in order to make this mooring. That is the substance of it, I think.

Mr. Scully: Then he said he backed down.

Q. By Mr. Scully: Did you say you laid alongside of the barge?

A. Lay alongside off the barge, but with my wire slack but taut enough in case I had to back down against it all I had to do was to ring two bells and have one man

(Testimony of E. A. Reeves)

standing by the winch, brake on the winch so when the tug came against it he could slack just a little and it wouldn't jerk against the wire, and would come against it easy.

The Court: I understand it.

Q. By Mr. Scully: Did you see the fastening of the mooring pendant from the float to the Barge 4414?

The Court: Read that question, please.

(The question was read.)

A. I could see Tomasic, Rudy Tomasic, pull in at it with a pipe pole, and the pendant was down, hanging down in the water, and it takes quite a little pulling to get it up, and a little time, and I could see him working with it. And [124] he laid the pipe pole down after he got it to him with the pipe pole, and then pulled it in by hand and laid it over the bit on the barge.

Q. At that time was the barge making any headway at all? A. No, sir.

Q. Was she dead in the water? A. Yes, sir.

Q. Then what happened? What did you do or what did Tomasic do?

A. I believe I hollered and said, "Is everything O. K.? Is she O. K.?" And he said, "Yes, she is O. K." And I kicked up alongside and he threw my wire off, my tow wire, and came aboard with a pipe pole. I played my spotlight on the length of the barge and we left and went into berth 94, I believe it was.

Q. When you played your spotlight on the length of the barge did you observe anything abnormal or unusual?

A. No, sir, she looked just like she did when we left the island.

(Testimony of E. A. Reeves)

Q. Did you see the float at that time?

A. I don't remember if I did or not. It was such an ordinary, common thing that we did all the time that nothing was out of the ordinary, and it was being done so much, when everything was all right you wouldn't—you [125] wouldn't be inspecting the barge if you figured everything was all right.

Q. After you saw Tomasic drop the pendant over the bit on the barge did you at any time thereafter tighten your line between the barge and the tug? A. No, sir.

Q. Are you positive of that?

A. I am pretty positive of it. I don't believe I even backed down against the barge, because she had no headway, she was at a dead stop, other than the surge back and forth.

Q. Captain, do you know whether or not you pulled that barge over the mooring float?

A. I don't think I did.

Q. Would you know if you did?

A. Yes, sir, I suppose I would.

Q. Did you? A. No.

Q. Did you make an entry in the log—

A. No, sir.

Q. Just a moment. Did you make an entry in the log for that night of the mooring of the Barge 4414, did you enter the fact that you had moored her?

A. Yes, sir, I always enter that, the time of the mooring. [126]

Q. Does your log show any reference, if you know, to any abnormal occurrence there at that time, other than the fact of mooring? A. I don't believe they do.

The Court: Where is the log?

(Testimony of E. A. Reeves)

Q. By Mr. Scully: Do you have the log?

A. No, sir. The company keeps the record of the log.

Mr. Scully: We will try and get that, your Honor.

The Court: I think if you are going to use that, that would be the best evidence.

Mr. Scully: It probably would.

The Court: He merely says he didn't think he did.

Q. By Mr. Scully: What did you do after you left there? You went to berth what? A. 94.

Q. What did you do there?

A. We secured the boat and our relief was there, and we went home.

Q. Did you see the mooring float that night?

A. Yes, sir.

Q. Will you describe its appearance?

A. Well, it had moss, green moss on it, and it looked as if it was floating level with the water, and it had a "U" bolt 2 inches in diameter and up about 10 or 12 inches in a "U" shape. [127]

Q. You said level with the water; did you see any freeboard on the float itself? Was any portion of the float above and riding clear of the surface of the water?

A. I think she was just about level with the water.

Q. What would that indicate to you as a result of your experience and knowledge of such things in Los Angeles Harbor?

A. She must have been waterlogged, and a very old mooring, and a short scope of chain on it. She must have been up and down on her chain, almost. Either one could cause it.

Q. You said short scope of chain. Just what do you mean in landlubber's language on that?

(Testimony of E. A. Reeves)

The Court: I think I know. That the chain wouldn't be long enough to give much play to the float, is that correct?

The Witness: Yes.

The Court: If it is a short chain and there was a considerable depth of water there she would be almost straight up and down?

The Witness: Yes, sir.

Q. By Mr. Scully: About how long did it take you to moor this Barge 4414 that evening?

A. I couldn't say exactly, but it must have been between 5 and 10 minutes.

Q. About what time do you think you left the mooring [128] float having secured Barge 4414 thereto?

A. I believe my log says about 12.

Q. Midnight?

A. It is exact in the log, yes, sir.

Q. Did you see the Barge 4414 after that evening?

A. I didn't see it when it was turned over. I have towed the barge since then and on the same job.

Q. Did you observe the length of the mooring pendant which was attached to the top of the float that evening?

A. No, sir, I couldn't say how long it was. I observed the pendant, but I couldn't say how long it was.

Q. Do you know what the approximate depth of the water is at the place where that float was anchored?

A. I would say it is between 18 and 25 feet, minus tide.

Q. You mean a low tide? A. Yes, sir.

Q. Have you ever in your experience at sea and in these harbors had occasion to observe damage to the bottom of a barge of a similar type to 4414 caused by mooring floats?

(Testimony of E. A. Reeves)

Mr. Toner: If the court please, I should like to object to this witness testifying to that type of question, inasmuch as he is a definite marine man engaged in the towing business and not engaged in the repairs, nor is he qualified to speak concerning repairs of damage to barges. [129]

The Court: This is a foundational question, so the objection is overruled.

The Witness: Could I have the question again, please? (The question was read by the reporter.)

The Witness: No, sir.

Q. By Mr. Scully: Have you ever seen barges of this type loaded similarly to the way the barge was that night come in contact with mooring floats? A. Yes, sir.

Q. Under what circumstances?

A. I have seen them overrun the mooring floats, and I have seen them come up against them with pretty good headway on, and I have even pulled one of them off that another tug run over the mooring with, I pulled the barge off, and no damage whatsoever to the barge.

Q. In the other instances that you saw overrunning occur, as distinct from this last one that you helped pull off, was there damage to the hull of the barge?

A. No, sir.

Mr. Scully: You may cross-examine.

The Court: Do you think this will be very extended?

Mr. Toner: No, it will not.

Cross-Examination

By Mr. Toner:

Q. Mr. Reeves, when you picked up the Barge 4414, did [130] you consider her seaworthy to make the trip across the channel? A. Yes, sir.

(Testimony of E. A. Reeves)

Q. You have a duty to the barge not to pick her up unless she is seaworthy, do you not?

A. That is correct.

Q. You had no trouble coming over?

A. No, sir.

Q. How long is the bridle upon which you pulled her?

A. I believe around 50; they run anywhere from 35 to 60 foot pendants.

Q. What was this one, if you know?

A. I don't know for sure. I wouldn't say for sure.

The Court: Mr. Toner, I want to ask a question just there.

When you speak of the bridle, would that mean the entire length from one bit to the other on the barge, or would that mean just one way?

The Witness: Sir, that would mean from the shackle to the bit, one pendant, the length of one pendant.

The Court: There are two pendants?

The Witness: Two identically the same length, yes, sir.

Q. By Mr. Toner: When you refer to wire you refer to the distance from your tug back to the place where these two pendants join? [131]

A. When I refer to wire I mean all the way to the barge.

Q. So when you said that you shortened to 30 or 40 feet of wire, did you mean 30 or 40 feet of wire in addition to the pendant—to the bridle, or including the bridle?

A. Well, I could mean either one.

Q. What did you mean this time?

A. You usually shorten about 40 feet from the shackle, so when you are maneuvering around your pendants, that the pendants won't get in the wheel of the boat, there will

(Testimony of E. A. Reeves)

be enough wire so they will hang down deep enough and you won't pick them up with the wheel of the tug.

Q. How far away was the tug from the bow of the barge then? A. From 40 to 50 feet.

The Court: Read the answer.

(The answer was read.)

The Witness: I never measured it, but that is—

The Court: About?

The Witness: Yes, about. That is a guess.

Q. By Mr. Toner: Was it a dark night?

A. It was fairly dark.

Q. How big is the tug?

A. It is 65 feet over all, I believe, approximately.

Q. Were you in the pilot-house? [132]

A. Yes, sir.

Q. And the pilot-house is located forward on the tug?

A. Yes, sir.

Q. You say you made your usual landing?

A. Yes, sir, that is right.

Q. At what rate of speed did you pull the barge from the point you transferred the other barge to the Dispatch to the time you shut off power before coming to the mooring float? A. Very slow.

Q. What rate? A. Rate per knot?

Q. How many knots?

A. I would say she wouldn't make over one or three-quarters of a knot.

Q. From one to three-quarters of a knot?

A. That is right.

Q. From the outside of the harbor entrance?

A. No, sir, I didn't say that.

(Testimony of E. A. Reeves)

Q. Where did you transfer—

A. About a thousand foot off of the mooring. Maybe a little more.

Q. Where did you shorten—

The Court: You say one to three-quarters. That is three-quarters of a knot to one knot an hour? [133]

The Witness: Yes, sir.

Q. By Mr. Toner: When you were a thousand feet from the float you transferred the barge to the Dispatch, the second barge? A. I didn't say that.

Q. What happened?

A. I transferred the man at about a thousand.

Q. Then you continued to pull the barge toward the float? A. Yes, sir.

Q. At about the same speed? A. Slowly.

The Court: Pardon me. As I understand it, he had already released the other barge to the tug Dispatch before that time.

Q. By Mr. Toner: Where did you release the other barge to the tug Dispatch?

A. I believe I have already stated that.

The Court: I know, but answer it now.

The Witness: I wouldn't say exactly. It was somewhere en route from the east entrance, it was some place between the east entrance and the mole job, on the approaches of the mole job.

Q. By Mr. Toner: Who took the pendants off the Barge 4414 when you transferred the other barge to the Dispatch? [134]

A. No one took the pendants off of 4414 when I transferred the barge to the Dispatch.

(Testimony of E. A. Reeves)

The Court: It wasn't necessary to?

The Witness: No; he took the other barge.

Q. By Mr. Toner: Someone had to unhook the two barges, didn't they?

A. Yes, but we towed 4414 on to the mooring. They didn't unhook 4414; they unhooked the other barge.

Q. Who took the moorings off the stern of Barge 4414?

A. There were no moorings on the stern of Barge 4414.

Q. There is a bridle that runs from the stern of 4414 to the other barges, isn't there? A. No, sir.

Q. Was Barge 4414 the second barge?

A. It was the last barge.

Q. So that you transferred the first barge to the Dispatch? A. Yes.

Q. And then you went back and picked up 4414?

A. I shortened my wire.

Q. Did you have any trouble seeing the mooring float as you put the spotlight on it coming up to the float?

A. I had no trouble after I put the spotlight on it.

Q. How far away did you see it, or how far away was it when you first saw it? [135]

A. I would say a thousand, 1200 feet.

Q. I believe you said when you were 100 feet from the block you cut your speed; is that correct?

A. I don't think I said that. I slowed down when I put the man aboard, a thousand feet.

Q. When did you cut the power as you were approaching the block?

A. As I was approaching the block?

(Testimony of E. A. Reeves)

Q. Yes.

A. I think I shut the power off at 100 or 150 feet, I am not sure, I shut the power completely off and let her drift.

Q. And let the float drift ahead?

A. Let the barge drift ahead.

The Court: When you refer to the block, that is the same as the float, is that correct, Mr. Toner?

Mr. Toner: Yes. I believe this witness has been referring to the float as the block.

Q. By Mr. Toner: What time were you supposed to quit that night, Mr. Reeves?

A. We always got relieved after we had secured our tow and went into the dock, after making two trips to the island.

Q. Did you have any shift that changed at 12:00 o'clock midnight? [136]

A. They were never regular. They never knew exactly what time we were going to get in. They had to guess approximately what time to call the other crew.

Q. Did you have a radio aboard the tug?

A. We had a radio.

Q. What time did you tell your office you were going to get in?

A. You can tell them approximately.

Q. What time did you tell them?

A. I don't remember.

Q. March 31st was Saturday night, wasn't it?

A. I don't remember that. That has been almost three years.

Q. Do you remember where you went after you got the tug moored?

A. Yes, sir.

(Testimony of E. A. Reeves)

Q. Where? A. Home.

Q. Did you have any trouble seeing Tomasic getting the mooring pendant up from the block?

A. Repeat that.

Q. Did you have any trouble seeing Tomasic get the mooring pendant up from the block?

A. I could see him working on it, I could see that he was having trouble, it took him quite a little while to get [137] it, he was slow getting it up because he had to pull it up out of the water.

Q. Did you anticipate that there was any danger in mooring this barge to this particular mooring float?

A. No, I never had any trouble previous to that.

The Court: Had you moored other barges to the same mooring float?

The Witness: Yes, sir.

Q. By Mr. Toner: I believe you said that you didn't see the mooring float itself after you left the barge?

A. No, I didn't.

Q. You didn't pay any attention to it?

A. No; I put the light on the barge and played it the length of the barge and turned it off and went in.

Q. Which mooring bit was used for mooring the barge? A. It was on the starboard one.

Q. Starboard forward? A. Yes.

Q. Were you in sole control of the tow and the mooring? Did you take orders from anybody as to the tow or the mooring?

A. No, sir; I was responsible for the tow until it was delivered to the mooring and secured properly.

Q. And you took your orders from Case Construction Company? [138]

A. From the dispatcher over there.

(Testimony of E. A. Reeves)

Q. Do you know whether the barge took any water on the trip over?

A. No, sir, I didn't gauge it. They all usually take some water.

Q. How much?

A. It is hard to say. You would have to know the condition of the barge to gauge it.

Q. Did you have any trouble with the barge?

A. No, sir.

Q. You didn't run her on the mole, did you?

A. No, sir.

Q. You didn't run her on the breakwater?

A. No, sir.

Q. As far as you know the barge was in good shape at Catalina, is that right?

A. Yes, sir, as far as I knew.

Q. Could she have come across the channel with a hole in her?

A. Sure she could come across the channel with a hole in her.

Q. Right side up? A. Yes, sir.

Q. With a hole 2 inches by 6 inches?

A. No, not with a hole 2 inches by 6 inches in her. [139]

Q. What would happen to the barge with a hole that size in it? A. 2 inches by 6 inches?

Q. Yes.

A. The chances are she would sink or dump her load and float full of water.

Mr. Toner: I believe that is all.

(Testimony of E. A. Reeves)

Redirect Examination

By Mr. Scully:

Q. Captain, when does your responsibility for the engagement which you undertook that day to tow that barge to Los Angeles Harbor cease? When were you through with your contract or your job in that respect?

A. After the pendant was on the bit and the barge was secured properly.

Q. And in your opinion, based upon your experience and upon what you did that night, was it properly done on that occasion?

A. Yes, sir, it was.

Q. According to the rules, judgment and degree of care exercised by seamen and pilots in Los Angeles Harbor operating towboats?

A. Yes, sir.

Q. You occupied what position on the Rocona? Where were you standing on the Rocona as you watched Tomasic fishing [140] for the pendant at the float?

A. I had my head out the starboard window in the pilot-house where I could see him and the barge.

Q. Was your vision at all obstructed except by the darkness at that time?

A. That is all.

Q. How far away were you from him at that time in a straight line of vision?

A. The width of the barge and about 15 or 20 feet besides that.

Q. What do you estimate that to be in total feet?

A. Well, I imagine around 60 feet.

Q. Did you have any difficulty seeing him? Could you make out what he was doing?

A. I could see him fighting to get the pendant up, and it seemed that he was having quite a bit of difficulty taking it aboard. It took him quite a little while.

(Testimony of E. A. Reeves)

Q. Were you at the controls at that same time? Were they within your reach?

A. Yes, I had the bell cord in my hand.

Q. Was that the way you controlled your craft?

A. Yes, all I had to do was ring two bells, I could have backed the barge clean away from the mooring float.

Mr. Scully: That is all, your Honor.

The Court: You are excused, Captain. [141]

I think the court will take an adjournment at this time until 10:00 o'clock tomorrow morning.

The witnesses are ordered to return at that time, those that have not testified.

I understand the Captain has some important business, and you have no desire that he remain?

Mr. Toner: I have no desire, no.

Mr. Scully: I would like to excuse him, your Honor.

The Court: He is excused.

(Whereupon, at 4:15 o'clock p. m., Tuesday, December 16, 1947, an adjournment was taken until 10:00 o'clock a. m., Wednesday, December 17, 1947.) [142]

Los Angeles, California, Wednesday, December 17, 1947.
10 A. M.

The Court: Proceed.

Mr. Toner: I should like to move to reopen my case in chief to introduce the chart No. 5147, which I offer as Libellant's Exhibit next in order.

The Clerk: No. 4.

Mr. Scully: My only comment in that respect, may it please your Honor, is as I made the statement at the opening of this case, that the chart is not objectionable to the

respondents and the claimant for use along with the witnesses' testimony who have used it to illustrate what they testified about.

The Court: That was understood at the time of the testimony.

Mr. Toner: Yes, that is the understanding.

The Court: It is received for illustrative purposes only.

Mr. Scully: That is my understanding of it, your Honor.

Mr. Toner: Yes. And it purports to give the physical situation as it now exists. And there is testimony of witness Jackson and marks by witness Jackson on the chart.

The Court: Let it be received and marked as Libelant's Exhibit 4. [144]

(The chart referred to was marked Libelant's Exhibit 4, and was received in evidence.)

Mr. Scully: May it please your Honor, with counsel's agreement I offer—I believe it will be Claimant's B—three log sheets bearing serial numbers 1360, 1361, and 1362, as a composite exhibit, being the log of the ship Rocona for the 31st of March, 1945, and a portion of the 1st of April, 1945, and ask leave to have it copied and the original withdrawn, inasmuch as these are the original sheets.

The Court: You have no objection to them?

Mr. Toner: I have no objection.

The Court: Let it be received with the understanding that copies may be substituted.

May I see them, Mr. Clifton?

(The exhibits were handed to the court.)

Mr. Scully: There may be some abbreviations on there which our next witness can aid the court in interpreting, inasmuch as he has personal knowledge of the log.

I call Mr. Tomasic as a witness.

Mr. Toner: If the court please, may I ask that we be furnished with a copy of the log, also, when the copy is filed?

Mr. Scully: That is satisfactory.

(The log sheets referred to were marked Respondents' Exhibit B, and received in evidence.) [145]

RUDY TOMASIC,

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Rudy Tomasic.

Direct Examination

By Mr. Scully:

Q. Will you state your residence and your occupation?

A. 212 West Sixth Street, San Pedro, California, and I am self-employed.

Q. What is your trade or profession?

A. I am a seaman, sir.

Q. And how long have you been such seaman?

A. Since I was 14.

Q. And in and about what waters?

A. Mostly around San Pedro and Southern California waters, and some deep sea time, also.

Q. Have you ever served in connection with tugboat operations and towing operations in and about Los Angeles Harbor?

A. Yes, I have.

(Testimony of Rudy Tomasic)

Q. For how long? A. About four years.

Q. Do you hold any certifications?

A. Now I hold a limited American Master's license and [146] unlimited Panamanian Master's license.

Q. During March, 1945 who were you employed by and what were your duties?

A. I was employed by Case Construction as deckhand on the Tug Rocona.

Q. Who was the master of that tug?

A. Captain Reeves.

Q. I call your attention to the 31st of March, 1945 and ask you if you made a trip from Catalina to Los Angeles Harbor with Atkinson Barge No. 4414 in tow?

A. Yes, I did.

Q. Will you state when you picked the barge up? And where?

A. We picked the barge up at Catalina Island, at the east end quarry, and we delivered her over to the Atkinson job on the mainland side.

Q. Describe the trim of the barge as you took her in tow?

A. The barge was loaded, she was down by the stern and rather light on the bow.

Q. Will you describe the freeboard that you observed at that time fore and aft?

A. I believe it was about one foot on the aft and about three feet forward.

Q. Was there any unusual or abnormal happening [147] during the voyage across the channel?

A. No, sir.

Q. What was the nature of the sea and the water during the crossing? A. It was moderate.

(Testimony of Rudy Tomasic)

Q. Were there any caps, whitecaps?

A. I don't remember that.

Q. Did you observe any spray or waves breaking against the Barge 4414 during the trip?

A. Well, almost on any trip that you are on you have spray and some water goes up on the barge regardless of whether it is calm or rough.

Q. Did that happen on that trip?

A. Yes, it did.

Q. Will you describe what you saw and what you did as you entered the harbor with that barge in tow that evening?

A. Well, we—

Q. And about the time.

A. I believe we entered the harbor about, oh, 11:30 and we checked by the Coast Guard and went through the net and went down to the Atkinson job and we tied up the barge we had left, that was 4414—we had given 4412 to the Dispatch—and after we were through tying it up we went in and were relieved.

Q. I ask you to observe the chart which is a libellant's [148] exhibit in this case, No. 4, and I point out to you the breakwater at the entrance to the harbor; do you recognize that breakwater?

A. Yes, sir.

Q. Is that the approximate situation that existed as you came into the harbor that evening in March, 1945?

A. Well, it doesn't show the Navy net, but the rest of it is approximately the same.

Q. The breakwater is as shown?

A. Yes.

Q. You see two entrances on that chart to the breakwater to the harbor?

A. Yes.

Q. Which entrance did you come through?

A. We came through the east end.

(Testimony of Rudy Tomasic)

Q. I call your attention to the mole which is apparently built, which is in the vicinity of the pencil marks on the chart, F.C.J. 1 and 2, and two X's near that initial; what was the condition of that mole at that time?

A. It was partially finished. I believe they were dumping small rock down at this end (indicating).

Mr. Scully: Witness indicates the easterly end of the partially constructed mole.

Q. By Mr. Scully: About what distance is it, Mr. Tomasic, from this east entrance to the breakwater to that [149] most easterly point of the mole?

A. Oh—

Q. Perhaps you can read the chart.

A. Approximately two miles.

Q. You mentioned turning the other barge, which was along with the 4414, over to Dispatch No. 2; about where did that occur with reference to a point northerly from the eastern entrance to the breakwater?

A. That occurred in through here (indicating), approximately this position (indicating).

The Court: Read the question.

(The question was read.)

Q. By Mr. Scully: Measuring out from this northerly, will you please place a mark, labeling it "T-1" where you turned the other barge over to the Dispatch 2?

(Witness does as requested.)

Q. About how far was that—

The Court: I think this map now and probably before really exceeded the limitation placed on it for illustrative purposes. It is being used for purposes of identifying places. I think it should be received without any limitation.

(Testimony of Rudy Tomasic)

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A. Oh—

Q. Perhaps you can read the chart.

A. Approximately two miles.

Q. You mentioned turning the other barge, which was along with the 4414, over to Dispatch No. 2; about where did that occur with reference to a point northerly from the eastern entrance to the breakwater?

A. That occurred in through here (indicating), approximately this position (indicating).

The Court: Read the question.

(The question was read.)

Q. By Mr. Scully: Measuring out from this northerly, will you please place a mark, labeling it "T-1" where you turned the other barge over to the Dispatch 2?

(Witness does as requested.)

Q. About how far was that—

The Court: I think this map now and probably before really exceeded the limitation placed on it for illustrative purposes. It is being used for purposes of identifying places. I think it should be received without any limitation.

(Testimony of Rudy Tomasic)

Mr. Scully: Very well. I will withdraw that objection, your Honor.

Q. By Mr. Scully: You have placed the mark "T-1" on Libelant's Exhibit 4. About how far off the mole workings [150] was that?

A. I would say about 200 yards.

Q. You said Barge 4414 thereafter was moored. Is that what you said?

The Court: Before you answer that question, Mr. Tomasic, I would like to ask a question if I may interrupt.

When you turned the other barge over to the Dispatch, and that was about the point "T-1"—

The Witness: Yes, sir.

The Court: —in which direction did the Dispatch move away?

The Witness: The Dispatch moved off in—it would be a northeasterly direction, I believe.

The Court: It would be northeasterly from T-1?

The Witness: Yes, sir.

The Court: And proceeded toward what is now the mole?

The Witness: Yes, sir.

The Court: But got well out of your way?

The Witness: Yes, sir.

The Court: Very well. Go ahead, Mr. Scully.

Q. By Mr. Scully: What was the condition of the way, if any, being made by Barge 4414 at the time you turned the other barge over to the Dispatch 2?

A. Well, she was moving very slowly.

Q. Could you approximate her speed? [151]

A. Oh, one at the most.

Q. One what? A. One knot.

(Testimony of Rudy Tomasic)

Q. Did you leave the Rocona at any time during this operation? A. Yes, sir.

Q. When and under what conditions?

A. After the Dispatch took the other barge we shortened up the towline, after we had it shortened up Captain Reeves backed down close to the barge and I jumped over with my pipe hole.

Q. Backed the Rocona down towards the barge?

A. Yes, the Rocona.

Q. What part of the Rocona did you leave in going aboard the 4414? A. The stern, sir.

Q. And what part did you first step onto on the barge? A. The bow, sir.

Q. To what extent did Captain Reeves shorten his line on the 4414 at that time?

A. He shortened it down until he had about, oh, 35 or 40 feet of cable off of the stern of the Rocona.

Q. That 35 or 40 feet which you mentioned, does that indicate the measurement from the stern end of the Rocona to the bow end of the barge, or what distance does it indicate? [152]

A. It indicates the distance from the stern of the Rocona to the bow of the barge.

The Court: That included both the cable and the bridle?

The Witness: That's right. But that does not include the wire from the stern to the winch.

Q. By Mr. Scully: Winch on what craft?

A. On the Rocona.

The Court: From the sternmost part of the Rocona to the bow of the barge it was about how far, did you say?

(Testimony of Rudy Tomasic)

The Witness: About 35 feet, sir.

The Court: And that included the bridle from the barge and there was a cable to the bridle, wasn't there, a shackle?

The Witness: If I may explain. You heave the bridle to the part where the shackle joins just over the stern (indicating).

The Court: I see. It was shortened so that the shackle just cleared the stern?

The Witness: Yes, of the Rocona.

The Court: Of the Rocona?

The Witness: Yes.

Q. By Mr. Scully: After you had shortened your line you were now clear of the other barge?

A. Yes, sir, the other barge was well gone by the time we shortened the line.

Q. What did you do and what did Reeves do with refer- [153] ence to the movement of the Rocona?

A. After I went aboard the barge?

Q. Yes, after you had cast off the other barge and you had shortened the line on 4414, what then took place?

A. He proceeded to the most westerly mooring.

Q. In what direction from "T-1"? A. West.

Q. To the mooring, you say? A. Yes, sir.

Q. Will you place "T-2" at the point that you recall was occupied by the mooring?

A. "T-2" would be here (indicating).

Q. About what distance is "T-2" from "T-1"?

A. A half to a quarter of a mile.

Q. Of a mile? A. Yes, of a mile.

Q. How far off the then existing works or land works was "T-2"? A. 1500 feet, I believe.

(Testimony of Rudy Tomasic)

Q. What was the greatest rate of speed attained by the Rocona with the 4414 in tow as she moved from the point "T-1" to the point "T-2"?

A. He proceeded a slow speed, I would say about one knot.

The Court: Mr. Tomasic, you say "T-2" is about 1500 [154] feet from what?

The Witness: From the mole, sir.

The Court: How far out was the mole built at that time?

The Witness: From the actual shore?

The Court: Well, here is the end of it out here (indicating); where does it come out? Can you tell about how far it was built by pointing on this?

The Witness: I believe that the mole was completed up to about this position (indicating).

Mr. Scully: Mark that "T-3," please.

(Witness does as requested.)

The Court: And this point "T-2" would be about 1500 feet away from here (indicating)?

The Witness: Yes, sir.

The Court: Do you know what the scale is on this?

Mr. Scully: A representative fraction of one over 12,000. One on the map equals 12,000 units on the ground.

The Court: Just looking at that, it seems to me that would be closer than 1500 feet.

Mr. Scully: That is what it looks like to me, too.

Of course, Mr. Tomasic is not attempting to make this to scale. But is this two miles from the entrance into—

The Witness: I believe on this chart each one of these represents a—let me see.

(Testimony of Rudy Tomasic)

Mr. Toner: Each of these is a minute. Each of these, [155] if I may interrupt, each of these is a nautical mile, which is about 6,000 feet.

The Court: Then it wouldn't be one-fourth of that distance here. It would be more in here (indicating). He has made it too close, anyway, to the mole, if the mole was built out there and it was 1500 feet.

The float that you moored to was about 1500 feet away from the mole?

The Witness: Yes, sir.

Q. By Mr. Scully: And you said that this point "T-1" and "T-2" are distant each from the other about a quarter of a mile? A. Yes.

Q. Do you refer to a nautical mile? A. Yes.

Q. That is about 1500 feet, then? A. Yes.

The Court: Then if this is correct from "T-1" to "T-2," "T-2" should be more out in here (indicating).

Mr. Scully: Yes.

The Court: We won't change it. We understand it is 1500 feet.

Q. By Mr. Scully: You understood my question what was the greatest rate of speed attained—

The Court: He has answered that. [156]

Mr. Scully: Yes, he answered that as one knot.

Q. By Mr. Scully: You were aboard the Barge 4414 at that time? A. Yes, sir.

Q. Describe the wind, current and surge, if you observed them, at that time.

A. Well, there was moderate conditions. There was nothing abnormal about the weather.

Q. Do you include surge in the weather?

A. Yes, sir.

(Testimony of Rudy Tomasic)

Q. Was there a surge?

A. There is always a surge in there, sir, regardless.

Q. Was there that night?

The Court: If there is always, that would answer it, wouldn't it?

Mr. Scully: I wanted to make it positive on the point.

Q. By Mr. Scully: Did you see the mooring float as you approached it? A. Yes, sir.

Q. How far away from that float were you when you first made it out?

A. The actual distance I can't say, sir. I first noticed it when Captain Reeves turned the light on it.

Q. Did you observe any other unoccupied mooring floats in that vicinity at that time? [157]

A. No, sir; the other ones had barges on them.

Q. Describe what took place as you approached the mooring float from the time you first discerned it when Captain Reeves played the light on it.

A. When we got a short distance away—

Q. About how far?

A. Oh. I would say about 200 feet, Captain Reeves stopped the boat, stopped the engine, the boat naturally worked ahead slowly.

Q. The Rocona?

A. Yes. The only way the barge and boat had after that was drifting ahead of the way that she already had.

Q. By that you mean motion forward?

A. Yes, motion forward. By the time we got up to the approximate position of the mooring the boat and the barge were practically dead in the water, stopped.

Q. Did the barge approach the mooring during that 200 feet dead on or at an oblique?

A. It approached her from the starboard corner.

(Testimony of Rudy Tomasic)

Q. So that if she kept on going what would be the relative position of float and barge?

A. The float would have been on the barge's starboard side.

Q. Was the line from the Rocona taut on the barge during this time? [158]

A. No. Captain Reeves had maneuvered the Rocona into a position where if he had to back down he would back down. The reason for this maneuver is sometimes a barge will go by and then you back down on her slowly and put her back in position.

Q. Did this barge on that occasion go by?

A. No, sir.

Q. Describe what happened then as you came up to the barge? You were on the barge, were you?

A. Yes, sir.

Q. Describe the position you occupied on the barge, what you did and what took place then.

A. I was on the starboard corner with my pipe pole, and as we approached the mooring I noticed that the pendant was hanging not on the mooring but straight down into the water. Therefore I reached down as we approached it and got ahold of this with the pipe pole, and then I pulled it up by hand out of the water and put it on the starboard Sampson post.

The Court: What was the composition of that pendant? What sort of material?

The Witness: It was cable, sir.

Q. By Mr. Scully: Rope or wire cable?

A. Wire cable.

(Testimony of Rudy Tomasic)

Q. What was its condition? [159]

A. It looked like it had been down in the water off and on for some time, because it had moss on it and I had a hard time getting it up.

Q. What difficulties did you experience in getting it up and what period of time, approximately, did it take to get it up?

A. It took me from five to ten minutes to get that up, sir.

Q. About how long was it when you finally got it up?

A. I would say between 35 and 40 feet.

Mr. Scully: Does the court desire an explanation of the Sampson post? It is the first time that term has appeared.

The Court: Yes.

Q. By Mr. Scully: Describe a Sampson post.

A. A Sampson post is a post on a barge usually one on each corner where you throw the mooring or a line over it to secure it and make it fast.

The Court: Has that been referred to as the bit?

Mr. Toner: Yes.

Mr. Scully: Yes, sir, it has.

Q. By Mr. Scully: During this time that you were fishing this pendant from below the surface you were on the barge? A. Yes, sir.

Q. And what was the relative position of barge to [160] float at that time?

A. The relative position of the barge to the float was the starboard corner was into the float.

Q. Were the two touching each other?

A. They were not touching, but they were very close.

(Testimony of Rudy Tomasic)

Q. Could you see all of the topside of the float?

A. Yes, sir.

Q. Did you go aboard the float? A. No, sir.

Q. Why?

A. It was covered with moss, and that is dangerous going aboard a float that way.

Q. Describe the type of moss.

A. Well, it was a moss that looked to me as if the float would go under water at high tides. It was the long hairy type moss that is just as slippery as could be.

Q. Was the float wet at that time on top?

A. Well, it wasn't wet, but it was slippery. The moss keeps a certain moisture in it all the time.

Q. Approximately, if you noticed it, how much of the float was above the surface of the water?

A. I would say that all except one of the corners was above the water.

Q. You are talking about the topside now?

A. Topside, yes, sir. [161]

Q. How much of the side, how much freeboard, in other words, did the float have?

A. One side it might have had about 2 inches, and the opposite corner was below water.

Q. Is that a normal or abnormal condition for a mooring float? A. It is an abnormal condition.

Q. What is normal?

A. The normal condition I would say, oh, 10 inches to a foot above the water. That is freeboard.

Q. On the float?

A. On the float. Well, the float gets wet occasionally, and it has some moss on it, but it is a different type of moss than the moss that accumulates when a float goes below the water.

(Testimony of Rudy Tomasic)

Q. Did you see this float the next day?

A. Yes, sir.

Q. And what did you observe then?

A. Well, the float still had the moss and it was undisturbed.

Q. Have you any opinion from what you observed there, and based on your experience as a seaman and handling those matters, as to the probable length of the anchoring cable running from the bottom of the float to the floor of the harbor? [162]

A. Well, I couldn't estimate the length that they had on it, but I believe it was short.

Q. What leads you to believe that?

A. The moss on the float, sir.

Q. During this time that you were having difficulty in getting the pendant free, where was the Rocona?

A. He was over on the port side of the barge.

Q. That is the left side of the barge?

A. Left side of the barge, yes, sir.

Q. Ahead, behind, parallel, or perpendicular to it, or what position did he occupy?

A. I would say he was just about parallel to it.

Q. About how far away from the barge?

A. Oh, it is hard for me to estimate that, because I was on the opposite side of the barge.

Q. You have no estimate of that? A. No, sir.

Q. Could you see them?

A. Yes, sir, I could see Captain Reeves.

Q. Where was he?

A. He was in the pilot-house looking through the window.

(Testimony of Rudy Tomasic)

Q. Was the window closed or open?

A. It was open. He had his head out.

Q. Did you see anybody else aboard the Rocona? [163]

A. I couldn't see Tom Gentle because he was back by the winch, standing by it, to let out cable or take in cable as the Captain ordered.

Q. Was the winch within your view?

A. No, sir.

Q. Was anybody with you aboard the barge?

A. No, sir.

Q. Mr. Tomasic, as you recall that incident that night and what occurred, did or did not the Barge 4414 override that mooring float? A. Absolutely not.

Q. How do you know that it didn't?

A. Because if that barge would have overrun that mooring float I would never have got ahold of that cable unless we made another pass at it.

Q. Did you feel any bump or any jar aboard the barge? A. No, sir.

Q. Did you hear any thud or crash or cracking?

A. Absolutely nothing, sir, outside of the normal noises that a barge always makes.

Q. That is a slapping sort of thing, isn't it?

A. That's right.

Q. What was the trim of the barge as you were attempting this effort?

A. She was approximately in the same trim as when we [164] picked her up at the Island.

(Testimony of Rudy Tomasic)

Q. Did you inspect for free water in the hold?

A. As I remember it we didn't check the hold, but Captain Reeves turned the light on it, and therefore you can tell just about how much is in it by checking the freeboard.

Q. When did he turn his light on it?

A. After we had turned loose of the barge he made a circle of the barge, turned his light on it, and when all was O. K. we went over to our berth.

Q. As you made fast the pendant from the mooring post to the Sampson post on the starboard corner of the barge what was the condition of the bridle and the line from the barge to the Rocona? A. The condition?

Q. Yes, taut, or was it attached, or where was it?

A. Well,—repeat that question, please.

The Court: Read the question.

(The following question was read by the reporter:)

“As you made fast the pendant from the mooring post to the Sampson post on the starboard corner of the barge what was the condition of the bridle and the line from the barge to the Rocona?”

The Witness: The line had no slack in it. Captain Reeves had the tug maneuvered in a position whereas he could back down without any undue movements. I would say the line [165] just had a slight strain on it.

Q. Was the barge making way at that time?

A. No, sir.

Q. Was she dead in the water? A. Yes, sir.

Q. Did you later cast off the bridle?

A. Yes, sir.

Q. From the barge? A. Yes, sir.

(Testimony of Rudy Tomasic)

Q. When?

A. Captain Reeves asked me if everything was made fast, and I told him yes, sir, and he told me to cast off the wires, and I did.

Q. Did you have any difficulty hearing the Captain?

A. No, sir.

Q. Do you know if he used a megaphone?

A. He didn't use a megaphone.

Q. Did you later board the Rocona?

A. Yes, sir.

Q. When? A. After the wires were taken in.

Q. What part of the barge did you leave and what part of the Rocona did you land on as you made the crossing?

A. I went across the barge and left the port side and came aboard the starboard side of the Rocona. [166]

Q. Which way was she headed at that time? The Rocona, I mean.

A. She was heading, I believe, north, approximately north.

Q. Then what did you do and what did the Rocona do?

A. We went to 22nd Street and checked in with the Coast Guard, and then we went back to our berth and we were relieved by Captain McCarty.

The Court: Mr. Tomasic, you said that you didn't get on the mooring because it was covered with this wet moss. Is it customarily necessary for you to get on a float under the circumstances which prevailed on that particular night?

The Witness: Yes, sir, when a line is leading straight into the water and not on top of the float, well, when you get on the float you have got an easier pull if you have to pull it in by hand.

(Testimony of Rudy Tomasic)

The Court: But in this instance you pulled it up with your pipe pole until you could get ahold of it?

The Witness: Yes, sir.

The Court: Was it where you could see it easily?

The Witness: I could see where it led down, but then I had to fish for it with my pipe pole. It was like groping in the dark.

The Court: Go ahead, Mr. Scully.

Q. By Mr. Scully: Have you ever attended or assisted [167] at moorings of barges of this type to floats before? A. Yes, sir.

Q. Approximately how many times, Mr. Tomasic?

A. Before that actual date?

Q. Yes.

A. I would say for a period of seven or eight months.

Q. Was this operation—and I include in “operation” the maneuvering and actions of the tug, the orders of her master, and the result obtained—normal or abnormal according to the standards of recognized seamanship in and about Los Angeles Harbor? A. Normal, sir.

Mr. Scully: You may cross-examine.

The Court: You are going to have him read that log.

Mr. Scully: Yes. Thank you, your Honor.

Q. By Mr. Scully: I show you Exhibit B for respondents, Mr. Tomasic, and claimants, the log of the Rocona for the 31st of March, 1945; will you point out to me where the entry concerning the picking up of Barge 4414 at Catalina appears?

A. It is here, sir. (Indicating.)

Q. Read the entry.

A. “1:30 P. M. Leave quarry with two flats in tow, 4414 and 4412 for Atkinson & Pollack job, Long Beach.”

(Testimony of Rudy Tomasic)

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(Testimony of Rudy Tomasic)

Q. That "A & P" is what you refer to as Atkinson & [168] Pollack? A. Yes, sir.

Q. The rest of it?

A. "11:30 P. M. Clear breakwater east entrance with tow.

"11:40 P. M. Clear net." He has "Navy" here. It is Navy net.

Q. This net we have been talking about refers to submarine net, being wartime at that time?

A. Yes.

"Arrived at mole with tow 12:10 P. M."

Q. Now, we refer to sheet 1361, the entry for 12:45.

A. "Start 12:10 A. M. Stop 12:45 A. M."

Q. That is April 1st, 1945?

A. April 1st, 1945. "Heave in wire; give 4412 to Dispatch and hung up 4414 to mooring."

Q. What does that hung up mean?

A. That is to secure.

Q. It doesn't indicate any abnormal grounding or collision, does it? A. No, sir.

Q. What time did you check out?

A. We left the barge at 12:45 A. M. and arrived at our berth, arrived at 22nd Street, the Coast Guard station, 1:05 A. M., we departed from there at 1:05 A. M. and arrived [169] at our berth, berth 94, at 1:20 A. M. At 1:30 A. M. we were relieved by Captain McCarty and crew.

Q. Sheet 1362 is further logging for the 1st of April, 1945. Please read that and tell me what the actions—

The Court: What is the importance of that?

Mr. Scully: I don't know whether it is in the stipulation or not, I think it is in the pleadings, that the Rocona

(Testimony of Rudy Tomasic)

was called back to assist in towing this damaged barge about the harbor to relieve her of some of her rock. This log shows she didn't do that at all. She made up another tow and proceeded to sea.

Mr. Toner: I believe the testimony yesterday was the Fortuna was the tug—

Mr. Scully: This wouldn't be material, if counsel will agree with me that the Rocona did not come back; that the Fortuna did.

Mr. Toner: Yes, we agree to that.

Mr. Scully: Very well. It isn't necessary to go further with that.

The Court: Proceed with the cross-examination.

Cross-Examination

By Mr. Toner:

Q. Mr. Tomasic, how old are you now?

A. Twenty-six.

Q. At the time of this accident you had had seven or [170] eight months of experience in mooring these barges?

A. On this particular job, yes, sir, this type.

The Court: Read the last question and answer.

(The question and answer were read by the reporter.)

Q. By Mr. Toner: When you took the barge at Catalina Island, did you feel she was perfectly seaworthy to make the trip? A. Yes, sir.

Q. And it is the tug's duty to see that she is seaworthy?

A. It is the captain's duty, the captain of the tug, to see that she is seaworthy, or not accept it.

Q. Pardon?

A. If not seaworthy the captain won't accept it.

(Testimony of Rudy Tomasic)

Q. Did the barge have any pumps aboard her?

A. 4414?

Q. Yes. A. Not that I know of.

Q. Isn't it usual for barges to have pumps aboard?

A. No, sir.

Q. At what speed did you tow the barges from the harbor entrance to the point where you turned them over to the Dispatch?

A. At approximately—from the harbor entrance, from the time we entered the harbor? Well, slowing down for the [171] Navy net, I believe we slowed right down and proceeded at slow speed, because at that time the Coast Guard was pretty hot around that district, and I would say we didn't proceed at more than two.

Q. At not more than two knots? A. No, sir.

Q. After you turned the Barge 4412, I believe you said— A. Yes, sir.

Q. —over to the Dispatch, then you proceeded at one knot? A. Yes, sir.

Q. At about half the speed?

A. Yes, about half the speed.

Q. I believe you said you went through the net and the gate? A. Yes, sir.

Q. How long did that take you?

A. Maybe 10 or 15 minutes.

Q. Did you have to stop there?

A. We had to slow down until they opened the gates and the net. Usually they were waiting for us.

Q. Did you have to make a report to the Coast Guard and identify yourself? A. Yes, sir.

Q. And all of that took 10 or 15 minutes? [172]

A. Yes, sir.

(Testimony of Rudy Tomasic)

Q. Where is the gate and the net?

A. The net is not shown now.

Q. Will you draw it in where it was?

A. The net came from this Rainbow Pier—

Q. Draw the gate in, too.

A. I would say the gate was—about that position here (indicating).

Q. Will you mark “Net” on the line you have drawn as “Net” and mark “Gate” to identify the marks you have made on the gate?

(Witness does as requested.)

Q. I believe you testified that you arrived off the harbor entrance at 11:30.

A. Yes, sir.

Q. And you went through the net at about 11:40?

A. I believe so.

Q. And you arrived at the point where you turned the Barge 4412 over to the Dispatch at about 12:10 according to the log, is that right?

A. Yes, sir.

Q. And from 12:10 to 12:45 you were mooring the Barge 4414?

A. Yes, sir.

Q. How was the tow made up? How were these barges [173] towed? In what order?

A. I believe that 4414 was the last barge and 4412 was the first barge.

Q. When you are at sea you have a long towline, don't you, about a thousand feet towline on the winch?

A. The actual length I don't know, but there is a long towline.

Q. It is approximately a thousand feet, isn't it?

A. Yes, sir.

The Court: He said he didn't know.

(Testimony of Rudy Tomasic)

Mr. Toner: He said approximately.

Q. By Mr. Toner: Then at the end of the towline you run to about a 40 or 50-foot bridle, is that correct?

A. That is correct.

Q. And that bridle extends down to each of the Sampson posts on the bow of the first barge?

A. Yes, sir.

Q. Then there is a bridle on the stern of the first barge, isn't there?

A. There is not a bridle on the stern of the first barge.

Q. How is that affixed?

A. Your bridles make fast to your main towline, there is a coupling there, and then also to that coupling is coupled another towline which goes under the first barge and up on the [174] bow of the second barge.

Q. And then there is another bridle on the bow of the second barge?

A. That's right.

Q. How much towline is there between the two barges?

A. I can't say as to that.

Q. Is it 50 feet or is it a thousand feet, or what?

A. Well, I can't tell you how much they had there, because—

Q. You have done a lot of towing in the daytime?

A. That's right.

Q. What is the customary practice?

A. Well, it varies on who is doing the towing.

Q. What did you do on the Rocona?

A. What did I do on the Rocona?

Q. What did the Rocona do?

A. At which point?

(Testimony of Rudy Tomasic)

Q. In making up the tow, separating the two barges.

A. Well, first of all in making up the tow the Rocona would go back to the barge that is second in line in towing, put her bridles on, and then run up to the other barge, run out the cable, and go up to the other barge, and then put the bridles on her and then take off to sea.

The Court: If I understand your testimony, Mr. Tomasic, the second barge was not attached to the first barge for the [175] purpose of towing.

The Witness: No, sir.

The Court: But the towline of the second barge went under the first barge.

The Witness: That's right, sir.

The Court: So that there wouldn't be a strain on the barges?

The Witness: That's right, sir.

Q. By Mr. Toner: How much distance was there between the two barges, approximately?

A. I would make a guess at about 300 feet.

Q. When you towed the two barges into the harbor did you shorten the distance between the two barges?

A. No, sir.

Q. You merely shortened the distance between the tug and the first barge? A. Yes, sir.

Q. You heard Captain Reeves testify yesterday that he saw the float at about a thousand to 1200 feet. Is that about the distance that the float was away when he turned the spotlight on it?

A. I couldn't swear to that, because I couldn't see the mooring at that time because I was lower on the barge than he was, but I seen the mooring in the light as soon as we came up to the point where I could see it. [176]

(Testimony of Rudy Tomasic)

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(Testimony of Rudy Tomasic)

Q. And about how far off was she when you could see it? A. Three-quarters of that.

Q. That would be from 750 feet to a thousand feet?

A. That's right.

Q. You heard Captain Reeves testify yesterday that he shut off the power when the barge was about 100 feet from the float, is that correct? A. I believe so.

Q. And he so testified yesterday? A. Yes.

Q. And your estimate today is that it is 200 feet?

A. I believe it was between 150, 200 feet, somewhere along that. I can't swear to the actual distance.

Q. What we want is your approximate idea. Would you say 100 to 200 feet? A. Yes.

Q. When Captain Reeves shut off the power?

A. Yes.

Q. And the barge continued forward on its momentum, didn't it? A. Very slowly, yes, sir.

Q. Shortly after the accident you made a statement that the barge was almost at a dead stop when you arrived at the mooring float? [177] A. Yes, sir.

Q. That is correct, isn't it? A. Yes, sir.

Q. That is the substance of your testimony today?

A. Yes, sir.

Q. When you got aboard the barge you used a pipe pole, didn't you? Or you brought a pipe pole with you, didn't you? A. Yes, sir.

Q. What was the purpose of that?

A. To reach over on the mooring and get the cable, or to reach down into the water and get the cable.

Q. From the barge? A. That's right.

(Testimony of Rudy Tomasic)

Q. It was just as easy, wasn't it, to pull the cable up from the barge as it would be from the mooring float, isn't that so?

A. If the cable was on top of the mooring, not down into the water.

Q. But it would be more difficult, would it, to pull the cable up from the barge if the cable was in the water?

A. Yes, sir.

Q. Why?

A. Because the cable hangs straight down and you are pulling over, you are pulling against the mooring and against [178] the cable. If you get on the mooring you have got a straight up-and-down pull.

Q. You mean you are pulling the cable over the mooring if you are pulling on the barge?

A. No, sir. Say your barge is right here (indicating), or your mooring, and you are on the barge, the top of that cable is secured in the mooring, am I correct?

Q. Yes.

A. When you are pulling up you have got some strain against the mooring and you are pulling two things at one time.

Q. You state that sometimes the barge will go by the float?

A. Yes, sir.

Q. And that is when the barge is pulled in too fast?

A. Not necessarily. The barge can be off a little bit, and sometimes I make a pass at the cable and I don't always get it.

Q. So that if the barge goes past—as the barge goes past the float you try to hook the cable with the boat-hook?

A. If the captain stops the barge there I can reach over and get it. A barge is never dead in the water

(Testimony of Rudy Tomasic)

actually, there is always some motion, and the current might take her by when the barge is dead. Under normal conditions a lot of [179] times you miss it, just get it almost up to you and then you drop it.

Q. And then you have to make another pass at it?

A. Sometimes you can reach it and sometimes you make another pass as it, yes, sir.

Q. And it is normal practice to come up to the mooring float and try to catch the mooring pendant as you approach the mooring float?

A. After the captain gives you the O. K. to put it on you can grab at any time you please. But you don't put it on until the captain says it is time to put it on. Sometimes a barge would come in too fast. I have worked with other skippers where they have brought the barge in too fast and you don't even get time to put it on the mooring.

Q. What do you do then?

A. Drop it and wait for the captain to come back around.

Q. What happens, does the mooring go by the barge?

A. Goes by the barge. They bring the corner of the barge into the mooring, not headon, they bring either one corner or the other corner, because there is no bit—on some barges there is—but you don't make it a practice to tie to the bit in the center. You always tie to one of the corner bits.

Q. Didn't you come in with tying to both bits, bridle [180] tied to both bits?

A. Yes, but you slip the mooring pendant under the bridle and over the Sampson post. That way you take your bridle off when you are through and just throw it over.

(Testimony of Rudy Tomasic)

Q. I am not sure that I understand that, because that was the next question I was going to ask you. How do you get the bridle off of the Sampson post after you have put the mooring pendant eye over the Sampson post?

A. I can't word it, but if you give me a piece of paper I can draw you the diagram. Here is the top of your Sampson post (indicating).

Q. This is a top view?

A. Top view, yes. Here is, we will say, one of your towing cables.

Q. That is what we have been referring to as bridle?

A. Yes. Here is your mooring, and here is your pendant; you take the eye of your pendant and lead it up to this point (indicating) and put it over. Therefore you can just take it and lift the bridle right over.

Q. Will you draw in the corner of the barge there?

A. Yes, sir.

(Witness does as requested.)

Q. Where were you standing on the barge when you grabbed at the mooring pendant?

A. (Witness indicates on diagram.) [181]

Q. How much space is there between the Sampson post and the starboard side of the bow?

A. You mean this corner right here?

Q. Yes. A. Perhaps six feet.

Q. And how much space is there between the forward part of the Sampson post and the bow of the barge?

A. I believe the distance is a little bit greater. I would say eight, maybe ten feet.

Q. Eight or ten feet?

Mr. Toner: I think perhaps we can offer this little diagram in evidence.

(Testimony of Rudy Tomasic)

Mr. Scully: No objection.

Mr. Toner: As Libelant's Exhibit 5.

The Court: Let it be received and so marked.

(The diagram referred to was marked Libelant's Exhibit 5, and was received in evidence.)

Q. By Mr. Toner: When you are coming in and making a pass at the mooring float, and you catch the mooring pendant, and you are able to slip it over the Sampson post, and the barge is still moving, what happens?

A. Well, if the barge is moving slow—if it is moving fast you don't even attempt it—but if the barge is just moving barely in the water you put it on, and then when the barge gets tight against the post, against the mooring, [182] the barge has a tendency to swing away from the mooring block.

Q. And swing out and everything is all stretched out in the direction of the swing, is that right?

A. That is right, sir.

Q. So that the mooring pendant runs from the bow of the barge up to the mooring float and then—

A. The barge hangs out behind it.

Q. That is correct. Does the barge ever come up against the scope of the length of line that you have there in that case?

A. Well, sometimes.

Q. What happens then?

A. Just as I have explained it to you, the barge swings away from the mooring.

Q. Supposing the anchor chain of the mooring float is extending aft along the line of the barge, does the barge ever come up with a bump against the scope of the mooring pendant and the anchor chain?

A. I don't understand your question, sir.

(Testimony of Rudy Tomasic)

Q. Let's say you are making a pass at the mooring float going in the direction of the wind?

A. Into the wind?

Q. Going downwind. And the mooring float would be here, and your mooring float and anchor would be down here, upward, wouldn't it? [183]

A. Yes.

Q. If your barge is coming in, going downwind, and you make a pass at the mooring float pendant, and you catch it, and you put it over the Sampson post and the barge goes by, what happens when you reach the end of the scope of the pendant?

A. In the first place, any captain who goes downwind with the barge is no captain, in the first place. The procedure is you come up the wind with the barge. In the second place, if that was to happen that barge would swing, actually swing away from the mooring. It wouldn't even come close to it.

Q. Would there be a possibility of its coming up hard against the end of the scope of the mooring pendant?

A. Well, if it would come up—

Q. I say is there a possibility that it would.

A. I believe there is a possibility, yes.

Q. What would happen then?

A. I believe you would either break your anchor chain or knock the Sampson post off.

Q. Would that have a tendency to drag the mooring float under water when it came up?

A. It would have a tendency to drag the float out of the water.

Q. Wouldn't it stretch out the anchor chain and the [184] mooring pendant to about a straight line?

A. About a straight line?

(Testimony of Rudy Tomasic)

Q. Yes, as you pull against the—

A. Do you mean on an angle up from the bottom?

Q. Yes.

A. It would lift one corner or half your block out of water, and the other half would be in the water; but it would be away from your barge.

Q. It would be in a straight line, however?

A. Yes, sir.

Q. Suppose you had missed your pass at the mooring pendant as you were coming in, as you did that night with the barge almost at a dead stop, would you have had to make another pass at the mooring float?

Mr. Scully: Just a moment. I am sure you don't mean to imply in it, counsel, as you did, that night, the missing of a pass at the float. You first put in about missing.

The Court: Read the question.

(The question was read.)

Mr. Scully: The wording is subject to that interpretation.

The Court: It might possibly be. Reframe your question.

Q. By Mr. Toner: Assume, Mr. Tomasic, that you were approaching the barge at almost a dead stop, approaching the mooring float at almost a dead stop, as you have testified, [185] and you missed the mooring pendant as you grabbed for it?

A. If I missed that mooring pendant I had plenty of time to make another pass at it.

Q. You wouldn't have had to go around and take another—

A. No, sir.

(Testimony of Rudy Tomasic)

Q. How far would the barge overrun the mooring float? A. Overrun the mooring float?

Q. Would it go by? A. At almost a dead stop?

Q. Yes.

A. As I have testified, that cable there is about 40 feet, and if that barge was moving I could let her go 30 feet and put her on and still not lose anything by it.

The Court: You mean you could still have reached down and gotten the pendant with your pipe pole, is that it?

The Witness: I could have walked back along the barge here and reached it. As a matter of fact, sometimes you have to do that and walk forward with it and put it on.

Q. By Mr. Toner: You figure you were 1500 feet away from the mole at the time?

A. That is my own estimate. Where the actual spot was is up to the surveyors.

Q. Where was the derrick barge that was unloading this rock? [186]

A. I believe there was one on the inside, and what other barges they had there at the time I don't remember.

Q. What was the closest vessel to the mooring float where you moored Barge 4414?

The Court: Read the question.

(The question was read.)

A. Well, I don't think there was a vessel around, but I believe there was two barges, two empty barges waiting to go out, hanging on another mooring.

Q. How far away were they?

A. Oh, it was quite a distance. A quarter of a mile, three-quarters, or so.

(Testimony of Rudy Tomasic)

Q. Were there any lights on those barges?

A. I believe there were.

Q. There were?

A. At night it is the procedure of the crew that takes care of the barges while they are in, the mound crew, to go out and put the lights on the barges. Otherwise, if there is a collision, someone runs into it, they are liable.

Q. And they are about a quarter of a mile away?

A. Yes, I believe about a quarter of a mile.

Q. Were there lights on the mole on the derrick barge?

A. I believe there were.

Q. What lights did you have on the tug?

A. What lights did we have on the tug? [187]

Q. Yes. Did you have your deck lights on?

A. We had our deck lights on, our running lights, tow lights, spotlight. As a matter of fact, we had everything going.

Q. Was there any light on the barge?

A. Yes, sir. Not actually installed on the barge. I always carried a flashlight with me, three-cell flashlight. And also from the after part of the tug there is a light that shines over on the barge, or if the tug is alongside the barge the side lights shine over.

Q. Was the mooring float when you were struggling with this pendant forward of the bow of the barge or was it alongside of the starboard bow?

A. It was approximately alongside of the starboard bow.

Q. What do you mean approximately alongside?

A. Well, it was just about on the corner. Like your barge is so (indicating), I believe it was right there (indicating).

(Testimony of Rudy Tomasic)

Q. About at the corner? A. Yes.

Q. Not in front of the barge?

A. Not in front of the barge, no.

Q. You said one corner of it was down?

A. Yes, sir. [188]

Q. You don't know how long an anchor line—

The Court: Do you remember which corner it was with relation to the barge?

The Witness: The corner of the—

The Court: The float that was down.

The Witness: No, sir.

Q. By Mr. Toner: Was it the near corner or the far corner?

A. Those floats, they have a way of changing, they shift around to different positions, and I couldn't swear—

Q. You don't remember? A. No, sir.

Q. It might have been the near corner?

A. It might have been the near corner; it might have been the far corner. That I don't remember.

Q. Is it customary to make a circle of the barge after mooring? A. Yes, sir.

Q. What is the purpose of that?

A. To insure the safety of the barge, make sure that she isn't listing. If she is, to report it to the mound crew.

The Court: Did you do that on that night?

The Witness: We made our circle, but we didn't have anything to report. [189]

The Court: I know. What I am asking you is did you make the circle.

The Witness: Yes, sir.

The Court: Did you observe the barge and the mooring as you made the circle?

(Testimony of Rudy Tomasic)

The Witness: Yes, sir.

The Court: By what light did you observe it?

The Witness: Well, as we made our circle pretty close I was standing at that time on the after part of the deck, back by the tow winch, I could observe it through the side lights of the tug. Captain Reeves probably seen it in the searchlight.

Q. By Mr. Toner: You heard Captain Reeves say before he left the barge he didn't notice the mooring float, he didn't pay any particular attention to it?

A. That is right.

Q. Did you happen to see the mooring float?

A. Yes, sir.

Q. You actually saw the mooring float?

A. Yes, sir.

Q. You are sure about that? A. Yes, sir.

Q. Where was it then?

A. It was right off the corner of the barge, the barge had moved a little bit and had— [190]

Q. Which way had the barge moved?

A. That I can't say. Most of the times after you tie up a barge it shifts with the direction of the current or the wind.

Q. Where was the mooring float with reference to the starboard forward corner when you saw it?

A. The mooring float was just off the corner.

Q. You say it had moved some? A. Yes.

Q. Had it moved out or—

A. It moved away from it.

Q. Forward? A. I believe it moved back.

Q. You believe it moved back? A. Yes.

Q. Backward on the barge? A. Yes.

(Testimony of Rudy Tomasic)

Q. So that it was alongside of the starboard side of the barge?

A. I meant that the barge had moved back; not the mooring float. The mooring float stands still.

Q. Yes, of course. I meant the moving of the mooring float with reference to the barge.

The Court: He said the mooring float didn't move.

Mr. Toner: That is right. It would be the barge that [191] would be moving.

Q. By Mr. Toner: Do you remember Captain Reeves asking you something about, "Is she O. K.?"

A. That happens with every barge—

The Court: Do you remember it on this occasion whether he did or not?

The Witness: I believe he did.

Q. By Mr. Toner: When was that that he asked you if it was O. K.? A. After I made her fast.

Q. What did you say? A. I said, "Yes, sir."

Q. What time had you expected to be in that night?

A. It had been my off watch when we came in, and I had just got up before we got in, and I didn't really know what time it was, what time it would actually be when we got in, because sometimes the mound men call you back and want you to dump a barge. We have no way of knowing that.

Q. Were you working on a salary? A. Yes, sir.

Q. Was Reeves working on a salary?

A. Yes, sir.

Q. Was Gentle working on a salary?

A. Yes, sir.

Q. What time would you have been off duty had you [192] gotten in before 12:00 o'clock?

A. Had we got in before 12:00?

(Testimony of Rudy Tomasic)

there was actually scratches on the mooring now. For all I know those scratches were on it before we even tied up, because other barges occasionally tied up there.

Q. You never saw the damage to the bottom of the barge?

A. No, I never looked at the actual damage to the bottom of the barge. I have seen—

The Court: Did you go there when the barge was capsized?

The Witness: Yes.

The Court: Didn't you look at the hole?

The Witness: No, sir.

Q. By Mr. Toner: Did you have any conversation with [195] any of the employees of the Guy F. Atkinson Company concerning this damage or this accident?

A. Not that I remember. Like on every job there is always talk, you are always talking to somebody. I don't remember if I told anyone anything about the accident or even if I mentioned it. That has been three years ago. I don't remember if I told anyone anything. If I did, I don't remember.

Q. Do you remember anybody telling you that the Tug Rocona pulled the barge over the float?

A. I have heard that now for three years off and on. But I have also heard of other incidents.

Q. Have you heard of other tugs pulling barges over floats? A. It happens.

Q. It is not an unusual thing?

A. It is not too unusual, no.

Mr. Toner: That is all.

(Testimony of Rudy Tomasic)

Redirect Examination

By Mr. Scully:

Q. When this occurs on other instances, others you have heard about, barges being pulled over floats, what is the normal result and the usual result?

A. There isn't any that I know of. I haven't heard of any damage being done. [196]

Q. It doesn't usually cause damage, then, as a necessary result of being towed over a float?

A. No, sir.

Mr. Scully: That is all.

The Court: The court will recess for a few minutes.

Mr. Toner: May I ask one further question?

The Court: Yes.

Recross Examination

By Mr. Toner:

Q. As a matter of fact, Mr. Tomasic, you were on the Rocona when she pulled a barge off a mooring float that some other tug had pulled onto it, weren't you?

A. Are you accounting to Captain Reeves' statement?

Q. Yes.

A. After I left Case I went in the service, and Captain Reeves continued working, and then he went with Johnson Western on the breakwater job that is going now, and I believe that is where his statement came from. When I went back to that job—

The Court: Were you there?

The Witness: No.

Q. By Mr. Toner: You were never on the Rocona or any other tug?

A. I have been on other tugs when they pulled them off.

(Testimony of Rudy Tomasic)

The Court: This refers to the Rocona. Were you on the [197] Rocona when she pulled any other barge off of a float?

The Witness: Not on the Rocona.

Q. By Mr. Toner: But on another tug?

The Witness: On another tug, yes.

Mr. Toner: That is all.

Mr. Scully: That is all. May the witness be excused, your Honor?

The Court: Yes, he may be excused as far as the court is concerned.

Mr. Toner: As far as I am concerned, too, your Honor.

The Court: Court will recess for a few minutes.

(A recess was taken.)

Mr. Scully: Call Mr. Gentle.

THOMAS J. GENTLE,

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Thomas J. Gentle.

Direct Examination

By Mr. Scully:

Q. What is your residence and occupation?

A. I am a towboat man living at 1272 West 14th Street, San Pedro.

Q. How long have you been in such occupation?

A. Three years. [198]

(Testimony of Thomas J. Gentle)

Q. On the 31st of March, 1945, were you aboard the Tug Rocona in the waters in and about Los Angeles Harbor?

A. Yes, sir.

Q. Did you have occasion to see the Rocona pick up the tow of an Atkinson barge, No. 4414, at Catalina Island on that date?

A. I was aboard the tug on that date when she was picked up, yes.

Q. What were your duties aboard the tug?

A. Deckhand.

Q. Who else was aboard the tug?

A. Captain E. A. Reeves was the master; Budreaux was the engineer; I can't think of his first name; and Tomasic was the other deckhand.

Q. During towing operations—and by such operations I mean during the time that mooring of any tow is accomplished—where on the vessel does the engineer perform his duties? Where is he located?

A. Are you speaking of the Rocona?

Q. Yes.

A. He is below deck at the engine control.

Q. There were two barges, I believe, towed by the Rocona from Catalina that day?

A. Yes, sir.

Q. What position in the tow did the 4414 occupy?

[199] A. She was the after tow.

Q. At sea about how far astern of the forward tow was the 4414?

A. The question again, please?

(The question was read.)

The Witness: The bow end of the after tow was approximately 430 feet from the forward tow.

(Testimony of Thomas J. Gentle)

Q. By Mr. Scully: What causes you to say that particular figure?

A. 400 feet of pigtail—pardon me. 500 feet of pigtail and approximately 35 to 40 feet of bridles.

Q. I refer you to Libellant's Exhibit 4, which is a chart, and ask you if you recognize the breakwater that is shown thereon.

A. As she sits here now I don't, because I can't see it.

(The exhibit was rearranged.)

A. Yes, sir.

Q. Showing two entrances, a westerly and easterly entrance? A. Yes.

Q. Which entrance did the Rocona and her tows enter on the 31st of March, 1945?

A. She entered the east gate.

Q. Do you recall that there was a submarine net there [200] at that time? A. There was.

Q. And a gate there, too? A. Yes.

Q. I call your attention to the entries on the map designated "Net" and designated "Gate" and ask you if that represents the approximate locations of those items at that time.

A. Yes. the gate was right square of the main channel in the 44-foot depth.

Q. As I believe the facts are, the forward tow was delivered to another tug after the entry through the breakwater that evening, is that correct?

A. That is true.

Q. Where did that delivery occur with reference to the easterly gate to the breakwater?

A. Well, let's see. Approximately north northwest of the gate a quarter of a mile off of the inside entrance

(Testimony of Thomas J. Gentle)

to Long Beach Harbor, a quarter to a third of a mile. I can't be too sure of that.

Q. Describe the operations by which that delivery was made.

A. Well, the main tow wire was brought hard up against the winch.

Q. What do you mean by that, Mr. Gentle, to bring a tow [201] wire hard up against a winch?

A. I brought the bridles right up to the winch of the forward tow, and then the wires were taken off the first barge and we pulled them aboard, which relieves the first barge to the Dispatch No. 2.

Q. At that particular point that first barge which was being turned over to Dispatch No. 2 was then free of all control for a short period of time, do I understand that correctly?

A. I can't say on that, because I can't remember whether they made up alongside of it or whether they took it on a string, sir.

Q. What happened with respect to the Rocona and the 4414 then, after delivery was made of the other barge?

A. Read the question again, please.

(The question was read.)

The Witness: Inasmuch as the Rocona has an air winch and we have a limited amount of supply of air, we have to proceed at a very slow rate, otherwise have no maneuverability of the boat, so at a slow bell she was run from that point to the most westerly mooring.

The Court: Was there any shortening of the line between the—

The Witness: Yes. I am sorry, sir.

(Testimony of Thomas J. Gentle)

Q. By Mr. Scully: Will you describe that, please, Mr. [202] Gentle, the shortening of the line?

A. The shortening of the line can't take place then until we have made up enough air, which takes approximately 15 minutes, something like that, and then it is reeled up—that is, the pigtail of the wire, it is not our main tow wire, but the pigtail is reeled onto the drum also.

The Court: The distance between the 4414 and the Rocona was shortened, wasn't it?

The Witness: Yes, sir.

Q. By Mr. Scully: To what distance, approximately?

A. I imagine the pigtail was hanging over the stern right around 20 feet, which would make approximately 60 feet between the stern of the Rocona and the 4414.

Q. The bow of the 4414?

A. The bow of the 4414.

Q. You proceeded, then, to the most westerly mooring float, you said?

A. That is right, sir.

Q. What was the greatest speed attained during that particular portion of the trip?

A. I can't say, sir.

Q. Have you any recollection at all?

A. I am sure we ran at a slow bell, and utilizing 360 horsepower with one tow the Rocona only makes four knots.

Q. How far was it from the place where you shortened [203] your line to the 4414 and proceeded to the most westerly mooring float?

A. I would have to measure it here on the chart. That is about the only way I could answer that question, sir.

(Testimony of Thomas J. Gentle)

Q. That chart has a representative fraction of 1 over 12,000. Would that help you?

The Court: Show him one of those squares that represents a—

Q. By Mr. Scully: These grids represent a nautical mile.

A. May I point to where I believe we were relieved of the first—

Q. I am going to ask you to place that on the map with a pencil mark and mark it "G-1," please.

The Court: We are getting so many marks on here, Mr. Gentle, will you please use this red pencil.

The Witness: Yes. I would say we were relieved right out in here (indicating).

Mr. Scully: Mark it "G-1."

The Court: Mark a cross there first.

The Witness: All right, I will put a cross there.

The Court: And mark it "G-1."

(Witness does as requested.)

Q. By Mr. Scully: Is that where you shortened your line, you say? [204]

A. That is where we were shortening our line and we were relieved of the first barge right there.

Q. Where is the mooring float to which you proceeded? Mark it "G-2," after designating it with an "X". These grids are nautical miles.

A. I can't say. I couldn't place it within four or five hundred yards. But it was up in this sector (indicating).

Q. Realizing that it is but an approximation—

A. Where was this finished to at this time? Then perhaps I can give you a better answer.

(Testimony of Thomas J. Gentle)

Q. This shows the mole as it stands today.

A. I know it does.

Q. Do you have any recollection yourself as to the extent of its completion on the day in question, March 31, 1945?

A. Well, they had come around the bend here, I am pretty sure, right around in here is where the minus 10 was.

Q. What do you mean by "minus 10"?

A. Well, they dumped to minus 10.

Q. Is that a craft?

A. I beg your pardon?

Q. Is that a craft?

A. No. They dump rock, shove it off the barges with shovels, and things like that, until it gets up to be minus 10, then they no longer—

The Court: Just put a mark there where you think was [205] about the end.

Q. By Mr. Scully: Mark it "G-2."

A. I would say right about in here (indicating). It is somewhere around in here.

The Court: About the end of the mole at that time?

The Witness: Yes.

The Court: In what direction from "G-2" was the mooring where you moored the barge?

The Witness: It was right out in here. There used to be a red light out in here, and it was very close in here.

Q. By Mr. Scully: Mark it "G-3" wherever you think it was. A. O. K.

Q. With an "X" to designate the spot.

A. All right.

(Testimony of Thomas J. Gentle)

Q. About how far was the point "G-3" from the nearest earth works or land works?

A. I don't believe it was over 400 feet, four, five hundred.

Q. Approximately what you have shown as your markings "G-1" and "G-3," according to the scale of the map it would indicate approximately a mile between the two. Was it that far? And if it was not, what is your best estimate of the distance?

A. I think it was a mile, myself, because it would take us quite a little time to get up there. [206]

The Court: He stated he thinks about a mile. Go ahead, Mr. Scully.

Q. By Mr. Scully: As you approached the mooring float will you describe the actions of the Rocona and the barge as you observed them?

A. We were running under a dead slow bell, I paid no attention to the float myself until it came alongside.

Q. Did you observe what way the 4414 had on her?

A. We were running at a full dead slow bell up to the last few minutes when he shut off.

Q. What in your recollection would that mean in knots per hour?

A. She couldn't have been traveling—this is strictly a guess, because after all one never knows until you can measure it, but I would say around half to three-quarters of a knot.

Q. Did you see the mooring of 4414 to the float?

A. No, not exactly. Being at the after winch I saw the mooring approaching the starboard side of the barge, and then Captain Reeves moving off to port backed down to where we were lying approximately alongside, just a

(Testimony of Thomas J. Gentle)

little bit forward of the bow with the stern approximately 20 or 30 feet aft of the bow.

Q. At that point what was the distance, approximately, between the barge and the Rocona? [207]

A. We were laying about 10 or 15 off, I guess.

Q. Was there any tension on the line?

A. No, sir.

Q. When did the Rocona slack off and drop tension from the line?

A. He had dropped tension approximately 100, 150, 200 feet away with slight maneuvers to get her to head into the correct position.

Q. Did the Rocona thereafter exert a pull upon the 4414? A. The question, please?

(The question was read.)

The Witness: "Thereafter"—I don't get it.

Q. By Mr. Scully: After she dropped her tension off that line and you were coming up to the mooring float, thereafter did the Rocona do any pulling of the 4414?

A. Not pulling. Only maneuvering.

Q. What do you mean by that?

A. Well, after all you have got to keep this barge going in a direct line, and being off to the side you can swing her or just come up against the line just enough to swing the barge. You couldn't hope to shut off your power 150 feet away or 200 feet away and have the barge run directly in a direct line right to the float. It would be unusual.

Q. Did you see Mr. Tomasic aboard the barge? [208]

A. Yes, sir.

Q. Did you see him attempting, or mooring the barge to the float? A. No, sir.

(Testimony of Thomas J. Gentle)

Q. Why?

A. Well, I was too far aft and the rock on the barge obscured my view, and particularly wasn't interested, anyway.

Q. Was there rock topside of the hatches aboard the barge?

A. No, sir; they had a bulkhead to stop it from coming up there.

The Court: In other words, the hatches were left free, is that right.

The Witness: That's right, sir.

Q. By Mr. Scully: Do you know whether or not the Rocona towed or otherwise caused Barge 4414 to run over the mooring float?

A. No, sir.

Q. You don't know?

A. No, sir.

The Court: What is the answer?

(The answer was read.)

Q. By Mr. Scully: Did you see the mooring float after that evening?

A. No, sir. [209]

Q. Did you see it the next day?

A. Yes, sir.

Q. What did you observe?

A. I observed that there was no great disturbance of moss on this mooring float, and also that several pieces of 4 by 4 had been built in a bulkhead around the iron ring on top.

The Court: Read the last answer, please.

(The answer was read.)

The Witness: May I add to that?

The Court: Yes.

Q. By Mr. Scully: Whatever your answer is.

A. And also the flotation on 48 hours later was much greater than in the night.

(Testimony of Thomas J. Gentle)

Q. What do you mean by that?

A. She had more freeboard.

Q. She was further above the surface of the water?

A. That is correct.

The Court: Could you see the float from your position on the tug?

The Witness: Yes, sir.

The Court: Before the mooring was made?

The Witness: Yes, sir.

Q. By Mr. Scully: What was her position with reference to flotation at that time? [210]

The Witness: She was quite low in the water.

Q. How much freeboard, if you can tell, did she have, approximately?

A. She didn't have more than approximately three inches at the most.

Q. How much did she have the next day when you saw her?

A. She ran about 8 or 10 inches above the water.

The Court: What about this part, Mr. Gentle,—you say there was something built on the float?

The Witness: This iron ring that we have been talking about in court here was bulkheaded up on four sides by two 4 by 4's.

The Court: Did that bulkheading appear to have been done just recently? When were you there, the next day?

The Witness: 48 hours later, our next shift.

The Court: And you saw it then?

The Witness: Yes, sir.

The Court: What appearance did it have as to the building up there?

(Testimony of Thomas J. Gentle)

The Witness: It was evidently put on there so that it would guard against the ring making any damage, I suppose. That is what my interpretation was.

The Court: Was that on there the night of the accident?

The Witness: No, sir.

The Court: Could you see that ring protruding there? [211]

The Witness: Yes, sir. May I add something or not?

The Court: You proceed to question him, Mr. Scully.

Q. By Mr. Scully: Describe the appearance of the float in respect to the moss that you said you saw when you inspected the float.

A. The moss was the long hairy type of moss, extending clear up to the top and over the edge onto the deck, we will say, of the float.

Q. What, in your opinion, would cause the collection of that moss as you observed it on that particular float?

A. There would be only two reasons that I can think of for that moss; one would be the lack of flotation of the float itself, the other one the fouling of the chain in an anchor or some obstructions on the bottom.

Q. What will cause lack of flotation in a mooring float of that type under those conditions?

A. Water—soaking.

The Court: If it becomes waterlogged it will not have as much flotation?

The Witness: That is correct. Or using too small a mooring for the weight of chain that hangs beneath it.

Q. By Mr. Scully: You mean that the chain hanging beneath it would tend to drag a too small mooring down somewhat? A. That is correct, sir. [212]

Mr. Scully: You may cross-examine.

(Testimony of Thomas J. Gentle)

Cross-Examination

By Mr. Toner:

Q. Mr. Gentle, you said you had three years of experience on towboats?

A. I have had three years experience on towboats.

Q. That is speaking as of today?

A. As of today.

Q. How much experience did you have on towboats as of March 31, 1945? A. 90 days.

Q. You are familiar with the operation of the Rocona, are you not? A. Perfectly.

Q. Is there an engine control in the pilot-house?

A. No, sir.

Q. The engineer stays below to operate the engine control? A. That is right, sir.

Q. How does the captain indicate to the engineer what is to be done? A. We have a bell system, sir.

Q. What is the signal that is used to go from a slow bell to stop?

A. May I qualify this somewhat? [213]

Q. Yes, just explain it.

A. In the pilot-house, we had the throttle in the pilot-house, thereby eliminating the slow bell. The one bell would be the stop bell, you understand.

Q. And the captain when he wants to stop he rings one bell? A. That is right.

Q. And the engineer stops the engine?

A. That's right.

Q. How long does that take?

A. Do you mean the complete operation?

Q. Yes, from the time the captain decides—

A. Four to five seconds.

(Testimony of Thomas J. Gentle)

Q. Forty-five seconds? A. Four to five seconds.

Q. How long of a runoff is there on the engine?

A. I don't understand, sir.

Q. How long does the engine continue to run until it stops?

A. It has a brake, sir, and it stops immediately.

Q. How soon? A. Half a second.

Q. Half a second? A. It has a brake on it.

Q. When you were 100 or 150 or 200 feet away from the [214] mooring float and Captain Reeves indicated to the engineer that he should stop, at what speed did you say you were going?

A. He was running at a dead slow bell.

Q. Which would be what percentage of full speed?

A. I suppose 10 per cent, I guess. This is strictly a guess.

Q. How many speeds do you have, how many forward speeds do you have on the Rocona?

A. There is about 12 notches on the throttle.

Q. Full up is going full speed?

A. But like any type of throttle the first two or three or four notches are more—you can observe the speed increase more than you can the last couple. In other words, when she begins to get to the top of her R.P.M. then there is not much difference in the notches.

Q. In harbor work, towing one barge, is it normal to go at dead slow bell? Is that the normal speed?

A. No, sir.

Q. What is the normal speed?

A. Full speed, sir.

Q. And that would give you four knots?

A. Approximately four knots.

(Testimony of Thomas J. Gentle)

Q. And half speed would give you two knots, would it?

A. Well, it might, sir. I can't say for sure. [215]

Q. In any event you were going 'at a dead slow bell, which you have estimated at a half knot to three-quarters of a knot?

A. That's right.

Q. And Captain Reeves has estimated at three-quarters of a knot to one knot, is that correct?

The Court: You do not need to incorporate Captain Reeves' testimony.

Mr. Toner: Very well.

Q. By Mr. Toner: The distance of 100 or 150 or 200 feet from the mooring float, is that the distance from the bow of the barge to the mooring float, is that what you are referring to?

A. That is a hard question to answer. I really meant when a tug is first shut down she is approximately 100 to 150 feet off.

Q. How close to the mooring float did the tug pass?

A. Possibly 15, 20 feet, I would say.

Q. Was the tug about at the center line fore and aft of the barge when she was towing into the mooring float?

A. She will run off to one side. We were running just a little bit off to one side.

Q. Which side? A. To port.

Q. Were you running off a little to port? [216]

A. Yes.

Q. After the power was shut off of the Rocona she continued to maneuver the barge into the float, is that correct?

A. Yes.

Q. By periodically pulling slight tension on the lines?

A. That is correct.

Q. So she would keep the barge heading directly in a straight line?

A. That is true.

(Testimony of Thomas J. Gentle)

Q. As she had 'been heading before?

A. That's right.

Q. I believe you said the distance from the point you delivered the other barge to the Dispatch to the mooring float was about a mile, is that correct?

A. I believe it was. That is strictly a guess.

Q. When was the first time you saw the mooring float that night? A. When she came alongside.

Q. You didn't see it until she was about 15 or 20 feet?

A. That is right. I never even looked for it.

Q. Was the float visible when you looked at the barge after mooring her?

A. I didn't see it. I didn't look.

Q. You didn't pay any attention? [217]

A. I didn't pay any attention.

Q. Did you circle the barge?

A. I know we circled the barge, but outside of that I don't—

Q. You don't remember seeing the float?

A. No.

Q. Is it customary in coming up to these mooring floats to have the barge at almost a dead stop?

A. With only just slight way on.

Q. When you saw the mooring float 48 hours later that was the same time Tomasic saw it? Was he with you at that time?

A. We were in the same crew.

Q. Was the mooring float right side up or upside down? A. The mooring float was right side up.

Q. Right side up?

A. Yes. And not usable, but ready for use.

Q. And the moss on the top of it hadn't been disturbed? A. No, sir.

(Testimony of Thomas J. Gentle)

Q. But there were these new 4 by 4's on it?

A. Yes.

Q. Was the moss disturbed at the point where they put on the 4 by 4's?

A. There was no moss to speak of where they put it on. It went up to the edge. [218]

Q. It wasn't on the top? A. No.

Q. It was on the sides? A. That is right.

The Court: Read that, please.

(The record was read.)

The Court: On the sides of what?

The Witness: The float, sir, mooring.

The Court: On the sides of the mooring, do you mean the sides that extend down into the water?

The Witness: Yes.

The Court: What about the top of the float?

The Witness: It was more or less free of any moss. The moss came right up to the edge of the float, and there the majority of it stopped. There was slight moss, just streaks here and there.

The Court: There was very little moss on top of the float?

The Witness: Very little; very, very little.

The Court: There was some that came over the edges of the float?

The Witness: Just right up to the edge.

The Court: But you did not see any moss on what we will call the deck of the float?

The Witness: No. That moss, when it is on deck like [219] that, it is only in very tiny little smatches, like this "D" sitting out in here (indicating). It is extremely slippery.

(Testimony of Thomas J. Gentle)

Q. By Mr. Toner: 48 hours later the float was higher in the water? A. True.

Q. And she had some 8 or 10 inches of freeboard?

A. Yes, sir.

Q. That would indicate that the float was not waterlogged to you, wouldn't it? A. That would.

Q. Was it the same float?

A. That was the same float, to the best of my knowledge.

Q. It might have been another one.

A. It could have been, sure.

Q. Was it moored to the same place it was when you made the landing of the barge there?

A. The relative position was the same, yes.

Q. How many floats did they have there?

A. Three, sir.

Q. Did you see any scratches on the float?

A. No, sir.

Q. Did you see the damage to the bottom of 4414?

A. At a distance of 200 feet, yes, sir, approximately.
[220] We rode by on the tug, that is all.

Q. Was she capsized at the time? A. Yes, sir.

Q. You couldn't see the damage itself in detail, though? A. No, sir, not in detail.

Q. Did you talk to any of the employees of Guy F. Atkinson Company about this accident? A. Sure.

Q. Did they indicate to you that the Rocona had pulled the Barge 4414 over the float? A. Definitely.

Q. Was this a mooring in the usual course of events? Was there anything unusual about the mooring at all?

A. No, sir; it was strictly routine.

Q. And you didn't pay very much attention to a routine mooring, did you? A. Very little.

(Testimony of Thomas J. Gentle)

Q. What time were you expected to be in that night?

A. To tell you the truth, I don't even know what time it was.

Q. That was Saturday night?

A. In other words, only from the testimony I have heard here that I knew that it was 11:30 or 12:00 o'clock, whatever it was. I didn't even know what time it was.

Q. Tell me this, Mr. Gentle: When the tug was alongside [221] of the port side of the barge she was starboard side to the barge, wasn't she?

A. That is right, starboard side to.

Q. Was there any tension on the bridle?

A. No, sir; I think she was laying slack in the water.

Q. Did you have to keep the bridle up out of the way of the tug's propeller? A. We watch it.

Q. And it runs along the deck of the tug?

A. No; it runs over the side and we wind it up on the winch as we are ready to take the bridles off.

Q. If necessary to reduce the way on the barge can the tug at that point control the barge?

A. Yes, sir.

Q. Would the tug back down?

A. Back down. We have hooks on our rails that pick up the wire and she backs against them.

Q. Or if it is necessary to maneuver the tug ahead, the barge ahead, that can be done too, can't it?

A. Yes, she is free to do almost anything.

Mr. Toner: I believe that is all.

Mr. Scully: No further questions, your Honor.

That closes my testimony. The respondents and claimant rest.

Mr. Toner: The libelant rests, also. [222]

The Court: The witnesses may be excused, may they?

Mr. Toner: Certainly.

The Court: Will you gentlemen return at 2:00 o'clock? I want you to argue this case. How much time would you want?

Mr. Toner: I think possibly a half hour, possibly 15 or 20 minutes.

The Court: How much time will you want, Mr. Scully?

Mr. Scully: I think, your Honor, some place between half and three-quarters of an hour.

The Court: I do not think it should take any three-quarters of an hour.

Mr. Scully: Probably it won't take that long. When I said that I had in mind going into some of the cases for your Honor on it. Of course I have cited in my law memorandum filed with your Honor last week most of the cases, and it will be in your Honor's discretion whether you desire me to go into those cases in the oral argument, or whether your Honor merely wants the benefits of those citations for later investigation.

The Court: Isn't this a question of fact?

Mr. Scully: It is pretty much, I think so.

The Court: Isn't it entirely a question of fact?

Mr. Scully: Mr. Toner, as to that question of fact, may seriously rely on his previous indication that the burden of proof rests upon the respondents, which we can't understand even in the light of the cases Mr. Toner has cited, and [223] the comments made about them in later cases. I think, though, to answer your Honor's question directly, it is solely a question of fact as it may be influenced by whatever rule of law—

The Court: What have you to say about that, Mr. Toner?

Mr. Toner: The only serious question of law involved is the question of whether or not this is a bailment. We recognize that the cases—

The Court: Even if there is a bailment, then what?

Mr. Toner: If there is a bailment it is incumbent upon respondent to prove what happened, to explain what happened.

The Court: You mean the doctrine of *res ipsa loquitur* applies?

Mr. Toner: No. That ties in with our negligence case. We have three possible approaches to the case. The first is the theory of bailment; the second is the theory of negligence and direct proof of negligence; and the third is the doctrine of *res ipsa loquitur*.

The Court: As far as this situation is concerned here, is there any practical difference in the approach or consideration of the responsibility of the respondent, either under the doctrine of *res ipsa loquitur* or that of bailee?

Mr. Toner: The end result is the same.

The Court: That is what I was going to say, because the explanation in either one, while the burden of proof remains [224] with the plaintiff the burden of producing testimony would be placed upon the respondent and an explanation would have to be made.

Mr. Toner: That is correct. On the bailment theory we proceed via the *ex contractu* route, and in the *res ipsa loquitur* case we proceed on the theory of negligence or *ex delicto*.

Mr. Scully: Might I interpose at this point? Where you said an explanation would have to be made, first of all I don't say that that is our duty. If it is, then I don't regard the explanation to be made as meaning that the

person bearing the burden must show what caused it. They must show that they exercised due care, if they have the burden, they must show that the fault was absent.

The Court: If *res ipsa loquitur* applies it would be the highest degree of care.

Mr. Scully: That is definitely settled that that is not in this case. I am sure Mr. Toner will agree with me in this case. It has been settled by the cases that the highest degree of care in these carrier cases is not present.

Mr. Toner: They are not an insurer. They have to exercise that degree of care that is necessary under these particular circumstances.

The Court: That would be ordinary care used under the same circumstances. [225]

Mr. Toner: Yes.

The Court: Then even if *res ipsa loquitur* applies, then in this situation the highest degree of care is not the measure of respondent's responsibility?

Mr. Toner: Unless we can convince the court that the tug is a bailee for hire under these circumstances.

Mr. Scully: Even then it doesn't apply, Mr. Toner, under your own cases. You must remember those cases that say that.

Mr. Toner: If the situation here is that of a bailment for hire there is a greater degree of care necessary, I feel.

In discussing this *res ipsa loquitur* situation, I would like to add the case of *Johnson v. the United States*, which we had the pleasure of taking to the Circuit Court of Appeals, and in that case stress was laid upon the exclusiveness of control, and I understand that the case was argued in the Supreme Court a few days ago, and the government has issued a bulletin saying that there was probably a reversal on its way, because of the showing

that there was no possibility of any injury except through the negligence of the respondent.

There are a number of cases that I should like to add to our pre-trial memorandum on the theory of *res ipsa loquitur*.

Mr. Scully: I might say on this point of *res ipsa loquitur*, your Honor, that the doctrine is not available to one who pleads specific negligence. He thereby puts *res* [226] *ipsa loquitur* out of the case. Mr. Toner has said, of course, as he would have to if he relies upon it, that it applies to his second cause of action, counting on negligence, and there the court will find very specific allegations of negligence. By his own pleading, and it is only consistent with the same attempts of the libellant here to gather any theory that might possibly sustain liability, that he now raises *res ipsa loquitur* as having anything to do with this case.

The Court: I will try to look over these authorities more fully. I glanced over them before the trial. I had very little time.

Mr. Toner: May I add—

The Court: Mr. Toner, the court will not have very much time between now and 2:00 o'clock. If you want to add additional cases maybe you had better have them in here. Is there any one case?

Mr. Toner: Yes. *Jesionowski v. Boston & Maine R. R.* is the most recent statement of the Supreme Court. It is at, 67 Supreme Court—

The Court: Do you have it in the U. S.—

Mr. Toner: I have the Advance Sheet here if it will help the court.

The Court: Just leave it here.

Mr. Scully: May I take the case to get its identification? All I have is this peculiar name. [227]

Mr. Toner: It is 91 L. Ed. Advance opinion 533, decided January 13, 1947.

The Court: Court will now recess until a quarter after two. Return at a quarter after two.

(Whereupon, at 12:15 o'clock p. m. a recess was taken until 2:15 o'clock p. m. of the same day.) [228]

Los Angeles, California, Wednesday, December 17, 1947.
2:15 P. M.

The Court: You may proceed, Mr. Toner.

(Argument of counsel reported but not transcribed.)

The Court: We have here a situation in which the libelant depends upon circumstantial evidence to prove libelant's case, and we have also his claim of the inference arising from the doctrine of *res ipsa loquitur*.

Certainly there has been a great deal of evidence on the question of the physical facts, and upon those physical facts the libelant claims that the inference is that the damage was caused through and by the actions of the respondent, and that the respondent had sole charge of the barge at the time the damage was caused.

We have, on the other hand, the evidence of the respondent as to what actually happened at the time. That is, the witnesses on behalf of respondent have testified as to what they did and what they observed at the time the mooring was accomplished.

I think it is a question of fact for the court to decide here. Even if there is an inference caused by *res ipsa loquitur*, that inference is to be weighed with other evidence on behalf of libelant as against the evidence presented by respondent.

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I think it is a question of fact for the court to decide here. Even if there is an inference caused by *res ipsa loquitur*, that inference is to be weighed with other evidence on behalf of libelant as against the evidence presented by respondent.

If we had a jury here it would be a question of fact for [229] the jury to determine, in the opinion of the court. Likewise, it is the duty now of the court to determine the issue when it has no jury for the purpose of finding facts.

Now that you gentlemen each have heard the other side's testimony, do you think it would be of any benefit to you or to the parties that you represent to consider the possibility of a settlement of this case? It is for the court to determine it and I am ready to determine it; but if you think that it is a matter that you might settle, you would be able to do something that the court could not do, you could reach a compromise on it. I have to decide it all one way or the other. If you would like to have time to discuss it, say, until tomorrow morning, it will be satisfactory to the court. If you do not, it is likewise satisfactory to the court. It won't make any difference to the court whether you do or do not. My idea will be just the same, but it is a question of fact, as I view it, and it is always possible for the court to make a mistake on a question of fact. I am ready to decide it or I am willing to let you have some time for consideration of it if you wish, let us say until tomorrow morning.

(Discussion between court and counsel reported but not transcribed.)

The Court: Will you gentlemen return in the morning at half past nine?

(Whereupon, at 3:40 o'clock p. m. Wednesday, December 17, 1947, an adjournment was taken until 9:30 o'clock a. m., Thursday, December 18, 1947.) [230]

Los Angeles, California, Thursday, December 18, 1947.

10:00 A. M.

The Court: I suppose you gentlemen were unable to agree upon anything in regard to this case?

Mr. Toner: That is correct.

Mr. Scully: That is correct.

The Court: The court is ready to decide it, as it was yesterday afternoon. I had Mr. Goldstein read some parts of the record so as to be sure that my recollection was correct as to certain portions of the testimony, and in my opinion this accident was caused through the negligence of the respondent. I think the libelant should recover.

The court reached this conclusion from all the evidence. I think that the circumstances, the physical facts, speak louder than the words of the witnesses in this instance.

It has been agreed that this should be referred to a special master, is that correct?

Mr. Toner: That is correct. Unless we can stipulate as to damages. Does counsel feel—

Mr. Scully: I don't care to make any statement about that at this time, counsel, because of the fact that I will have to consider this. We probably will take this thing up. In any event, whatever that decision is, I will have to go over the items in the file and talk to you later about any possible stipulation. [232]

Mr. Toner: In that event an interlocutory decree would be in order and a reference to a master.

Mr. Scully: I don't think I should be asked at this time, Mr. Toner, to stipulate to the damages.

Mr. Toner: I am not asking that. I was just sounding out the possibility of trying to avoid the extra expense and difficulty of a reference.

Mr. Scully: I don't say it is impossible. I just don't want to commit myself at this time.

Mr. Toner: I appreciate the situation.

The Court: Would you want the court to wait a short time before making any order of reference? As I recall the stipulation, it was that in the event the court should find in favor of the libelant there was to be a reference.

Mr. Toner: That is correct. The court is correct in that.

Mr. Scully: I would appreciate it if your Honor would hold such order until possibly Monday.

Mr. Toner: It will be incumbent upon us to prepare the interlocutory decree anyway, and we can hold that until such time as counsel finds convenient.

The Court: The court has indicated its ruling and will withhold the making of a definite order until I hear from Mr. Scully.

Mr. Toner: All right. [233]

The Court: I won't be here Monday, Mr. Scully, but I will be back right after Christmas. I am going to Fresno Sunday.

Mr. Toner: I think by sometime after Christmas we can determine between us as to whether or not an interlocutory decree and order for reference is the advisable course, or whether a stipulated decree is the advisable course.

The Court: Of course, if you agree as to the amount of the damages, that does not in any way bind the respondent as to the question of liability. It would just be in order to save the time and expense of a reference. If it

is a matter that may be determined, it should be determined without the cost of a reference. If you can agree upon the amount the court will simply make an order for judgment for the libelant in a certain amount. Then, of course, the respondent would have a right to appeal from the judgment of the court.

Mr. Scully: That is what I want to leave open, the right to appeal from the decision on the question of liability, if your Honor please. If I stipulated damages I wouldn't want to foreclose any right in that event.

The Court: That would not do that.

Mr. Toner: Counsel would have three months to appeal from the final decree and 15 days to appeal from the interlocutory decree. That would be the only difference.

The Court: If you can agree on the amount of damages, [234] I think it is much better.

Mr. Toner: Very well. Does the court care to have the case set over for a certain day, then?

The Court: No. I have already indicated what my ruling will be. I will just wait until I hear from Mr. Scully as to whether or not you have agreed upon the amount of the damages. If you have not agreed upon that amount, the court will make the order in accordance with the stipulation that was entered into, at least the pre-trial stipulation. Is that clear to everyone?

Mr. Scully: Yes.

Mr. Toner: It is very clear.

The Court: Court is now recessed.

[Endorsed]: Filed Feb. 18, 1948, Edmund L. Smith, Clerk. [235]

[Endorsed]: No. 11885. United States Circuit Court of Appeals for the Ninth Circuit. The Tug "Rocona," Johnson Western Company and Case Connolly Company, Appellants, vs. Guy F. Atkinson Company, Appellee. Apostles on Appeal. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed March 19, 1948.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11885

The Tug ROCONA, Her Engines, Tackle, Apparel and
Furniture, JOHNSON WESTERN COMPANY, a
corporation, and CASE CONNOLLY COMPANY,
a corporation,

Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,

Appellee.

STATEMENT OF POINTS ON WHICH APPEL-
LANTS INTEND TO RELY ON APPEAL

Appellants, the Tug Rocona, her engines, tackle, apparel and furniture, Johnson Western Company, a corporation, and Case Connolly Company, a corporation, intend to rely upon the points stated in their Assignment of Errors on appeal herein, which Assignment of Errors is a part of and is contained in the typewritten Transcript of Record certified by the Clerk of the District Court, and appellants incorporate their Assignment of Errors and the full contents thereof herein the same as though fully set forth at length.

Dated: March 17, 1948.

HILL, MORGAN & FARRER

By William S. Scully

Proctors for Appellants

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 19, 1948. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

STIPULATION RE: USE OF ORIGINAL
EXHIBITS ON APPEAL

Whereas, on February 17, 1948 the United States District Court for the Southern District of California, Central Division, in Admiralty, No. 6936-B allowed an appeal from the Interlocutory Decree and Order of Reference entered in said Court in an action wherein the above named appellee is libellant, and the above named appellants are respondents and claimant, and

Whereas, the record on said appeal is shortly to be transmitted to the above entitled Court for necessary action in the matter of printing Apostles on Appeal,

Now, Therefore, It Is Hereby Stipulated, by and between the above named parties, through their respective proctors, that all exhibits received in evidence at the trial in District Court may be used by the above entitled Court in connection with said appeal, in their original form, unattached to the record, and need not be printed in the said Apostles on Appeal.

It Is Further Stipulated, that this Stipulation may be printed in and become a part of the said Apostles on Appeal.

Dated at Los Angeles, California, February 18, 1948.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS and GREENE
HAROLD A. BLACK, and
GEORGE E. TONER

By George E. Toner
Proctors for Appellee

HILL, MORGAN & FARRER

By William S. Scully
Proctors for Appellants

It Is So Ordered, in conformity with the foregoing
Stipulation.

Dated at San Francisco, California, March 19, 1948.

FRANCIS A. GARRECHT

Justice of the United States Circuit Court of Appeals
for the Ninth Circuit

[Endorsed]: Filed Mar. 19, 1948. Paul P. O'Brien,
Clerk.

No. 11885.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

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Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,

Appellee.

APPELLANTS' OPENING BRIEF.

HILL, MORGAN & FARRER,
1007 Title Guarantee Building, Los Angeles 13,
Proctors for Appellants.

FILED

MAY 25 1948

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No. 11885.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

The Tug ROCONA, her engines, tackles, apparel and furniture, JOHNSON WESTERN COMPANY, a corporation, and CASE CONNOLLY COMPANY, a corporation,

Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,

Appellee.

APPELLANTS' OPENING BRIEF.

I.

STATEMENT OF PLEADINGS AND FACTS.

Appellants, the Tug ROCONA, etc., Johnson Western Company, a corporation (respondents below), and Case Connolly Company, a corporation (claimant below), are appealing from the Interlocutory Decree and Order of Reference of the United States District Court, Southern District of California, Central Division, entered in that Court on February 10, 1948. The case is one in Admiralty and was tried before the Honorable Campbell E. Beaumont, Judge Presiding. The statement of statutory provisions, pleadings and facts under Rule 20 of the above entitled Court follows:

A.

Statutory Provisions Believed to Sustain the Jurisdictions.

The cause was initiated, tried and handled throughout under the basic jurisdiction of the United States District Court, provided by 28 U. S. C. A., Section 41(3) (Judicial Code, Section 24). The libel filed is both *in rem* and *in personam*. The libel itself states specific facts, and such were proven at the trial, to the effect that the subject matter of the cause and the occurrences relied upon by the libelant below, took place upon the navigable waters of Long Beach Harbor, California. It is clear, therefore, that the District Court had jurisdiction.

This Court has jurisdiction upon appeal to review the Interlocutory Decree and Order of Reference in question under the General Statute, 28 U. S. C. A., Section 227, as amended (Judicial Code, Section 129).

B.

Pleadings Necessary to Show the Existence of the Jurisdictions.

Libel both *in rem* and *in personam* was filed in United States District Court in accordance with the statutory provisions referred to above. The libel appears at pages 4-9 of the record. In brief, the libel alleged a cause of negligent towage of and damage to a certain unpowered barge (referred to as Barge #4414), owned by the appellee. The libel alleged that Barge #4414, loaded with rock, was delivered to the Tug ROCONA at Catalina Island, California, to be towed to Long Beach Harbor, and there moored to a float. The first cause of action alleges such arrangement as a contract of towage for a consideration. Such first cause of action goes on to allege that the barge

was loaded with 879 tons of rock, was towed by the Tug ROCONA on April 1, 1945, and redelivered to the libelant at a mooring float in Long Beach Harbor in a sinking and unseaworthy condition, with a large hole punched in her bottom, approximately 20 feet aft of the bow rake and about five feet from the starboard side. It is further stated in the first cause of action that, to prevent the barge from sinking with its load of rock, the libelant towed the barge about the Harbor in order to discharge the load overboard. Claim is made for the cost of repairs, the value of lost cargo and detention damages, together with certain other incidental items of damages.

The second cause of action sounds in tort and, in brief, alleges that the ROCONA and the agents and servants of her owners, towed and moored the barge in an improper, careless and imprudent manner in that she was, upon being moored, allowed to override and run above the mooring float when the mooring pendant of the float was affixed to the mooring bit of the barge. It is thereafter stated in the second cause of action that the forward motion of the barge caused the mooring line and the anchor chain of the float to become taut, the mooring float overturning below the barge. Thereafter, in the second cause of action, follow five detailed specifications of negligent action on the part of the appellants relied upon by appellee as the direct and proximate cause of the damages to the barge.

The Pretrial Stipulation [pp. 16-20 of the Record], states the facts which were agreed upon between the parties prior to trial, and which, together with the record of testimony taken from witnesses, constitutes all of the facts before the trial court.

Appellants answered the libel admitting certain allegations and denying the substantial allegations of negligence and improper towing and mooring. The answer [pp. 10-16 of the Record] also clarifies the ownership of the Tug ROCONA at the material times. It is therein stated that the Tug ROCONA on April 1, 1945, was owned by Case Connolly Company, a corporation, the claimant below and one of the appellants in this Court, and that the vessel was operated by Case Construction Company, a copartnership. It appears elsewhere in the action, and was not disputed, that Johnson Western Company, a corporation, one of the appellants herein, is the successor in ownership to all of the assets and assumed all liabilities of Case Construction Company, the previous copartnership.

The answer denies the truth and accuracy of the specific facts alleged by the libelant and in contradistinction thereto alleges the true facts and circumstances in paragraph V of the answer [pp. 12-13], to-wit: That the barge was loaded by the libelant in an improper and unsafe manner and when delivered to the Tug ROCONA she was not in a safe, sound or seaworthy condition in that she was heavy by the stern with approximately two to three feet of freeboard at the bow and six to eight inches of freeboard at the stern. It is further alleged in the answer that the voyage between Catalina Island and Los Angeles Harbor was completed without untoward event and that at about the hour of twelve midnight on the night of March 31-April 1, 1945, the ROCONA moored the barge in a safe, proper and seamanlike manner to a certain mooring block or float provided by and the property of the libelant. The answer goes on to allege that having completed her towing and mooring engagement safely and properly, the tug departed and that at some unknown time thereafter damage occurred to the bottom

of the barge. On information and belief the appellants allege that the damage to the bottom of Barge #4414 was caused by the ebb and flow, rise and fall of the sea, lifting or impelling the barge up, over and upon the U-bolt affixed to the mooring block. Also, it is alleged in the answer that the chain from the anchor of the mooring float was too short, and that by reason of such condition the floating portion of the mooring facility was submerged or partially submerged, thus making it inevitable that a heavily laden craft moored thereto would, during high tide or medium tide, be hoisted or impelled upon and over the top of the mooring float. In answering the appellee's second cause of action the general denials are repeated, and it is further alleged that the tug, her agents, employees and servants, master and crew, used proper care, caution and seamanship both in the towing and in the mooring of Barge #4414.

The first stated separate defense is in the form of a general demurrer to paragraphs I to VII of the first cause of action, but not having relied upon such ground for dismissal of that cause of action below, appellants do not argue it in this Court.

As a second and separate defense the appellants alleged contributory negligence in respect to the furnishing of a mooring facility which was allegedly improper and unsafe.

Findings of Fact and Conclusions of Law are found on pages 21-26, and the Interlocutory Decree at pages 27-28.

Order allowing Appeal to the United States Circuit Court of Appeals for the Ninth Circuit was entered by the District Court within the three months time permitted under the statute. The Order Allowing Appeal appears at page 30 and the Petition for Appeal at page 29. As-

signment of Errors was filed at the same time and appears at pages 31-34 of the record.

We believe that the jurisdiction of the District Court and of this Court on appeal is clearly evident from the recitation of the pleadings.

C.

Statement of Facts.

The facts in this matter are not complicated. However, neither the actual *cause* of the damage, nor the *time* of the damage to Barge #4414 appear from direct evidence at any place in the record. The libelant (appellee in this Court) relied wholly upon inferences and what it claimed to be the burden resting upon appellants to explain what happened and when, and to demonstrate that the tug, her master and crew performed their duties properly and in a seamanlike manner.

The barge was loaded at Catalina Island by and under the direction and control of the owner (appellee). Barge #4414, along with one other barge, was towed to Long Beach Harbor, where the appellee was constructing a mole. The barge in question was the forward barge of the two being towed in tandem by the ROCONA across the Catalina Channel. The barge was riding high at the bow and low at the stern. No untoward event occurred during the voyage. After entering through the breakwater at Long Beach Harbor, the other tow was turned over to another harbor tug and the ROCONA proceeded with the barge in question (which was then almost dead in the water), to the float owned, maintained and furnished by

the appellee, which mooring was situated about a quarter or a half of a mile from the point of casting off the other barge.

When approximately 100 or 150 feet away from the mooring, the ROCONA shut off power to the extent that the barge was practically dead in the water as she slowly approached the floating mooring block. A hand was put aboard Barge #4414 for the purpose of accomplishing the actual mooring operation. With a pike pole, the hand finally and after considerable difficulty, succeeded in lifting the mooring pendant from the mooring block and putting it over the forward starboard mooring bit of the barge. The mooring pendant was about fifty feet long. At this time the undisputed evidence shows that Barge #4414 was virtually dead in the water and that the mooring float with which the hand (witness Tomasic) was having difficulty in respect to the mooring pendant, was on the forward starboard side of the barge. Also, at the same time, the Tug ROCONA was hove to off the port side, awaiting the completion of the mooring operation. The evidence shows that the Tug ROCONA was so situated and so maneuvered by her master that were it necessary, she could lend assistance in regard to controlling the operation of the tow—the line from the tow to the tug was still fast but no forward pull was being exerted upon the tow.

The witness Tomasic completed the mooring operation after spending a few minutes “fishing” up the pendant and then reboarded the Tug ROCONA which circled the barge, playing her light upon her to see that all was secure.

Thereupon, she departed from the scene. Normal ebb and flow of tide and harbor surge of the sea was present at all times.

Appellee's Assistant Project Manager, though not physically present when this barge came in, was charged with the duty and possessed of the authority over bringing in and mooring his company's barges and they were subject to such control and direction on behalf of appellee. Appellee's said employee was responsible for the tow until she was made fast.

Soon after the mooring was completed, one of the appellee's employees in a speedboat made his inspection rounds of the mooring facilities to see that all matters were normal and to inspect conditions in general. He particularly observed the Barge #4414 at her mooring and saw nothing abnormal, and regarded her as safe and secure. Approximately an hour and a half later—though not settled by the evidence with certainty—Barge #4414 was found in a listing condition and taking water over the sides and in the process of dumping her rock cargo overboard. Thereafter, assistance was given to her in respect to towing her about the harbor to salvage part of the load and to prevent sinking of the barge.

The following day Barge #4414 was capsized and a hole in her bottom was discovered about 20 feet aft of the forward rake and approximately five feet inboard from the starboard side. Planks numbers 22 and 23 were stove in. The hole was approximately the size and general pattern of the U-bolt on the top of the mooring float.

Scraping marks on the hull leading to the point of damage were apparent in a diagonal course from the forward starboard corner of the barge. There were also indentations on the planks in the vicinity of the hole, which indicated pressure of the U-bolt from the underside, but which did not actually puncture the planks at the point of indentation.

The principal difficulty with the case was the absence of direct evidence as to *when* and *how* the damage occurred.

The master and both hands aboard the ROCONA testified at length, independently and in precise detail how all of the operations in connection with the towing and the mooring were performed. The appellee's witnesses were able only to speculate concerning *when* and *how* the damage occurred. The matter came to the knowledge of appellees only when the barge was discovered in a sinking condition at least an hour and a half after the actual mooring operation was completed and the tug had left. Prior to that time one of appellee's witnesses, in making his tour of inspection of the harbor and the mooring facilities had observed all in due order with Barge #4414 moored to the float, in proper trim, and it was only some time thereafter that the barge was discovered to be in trouble.

The District Court wrote no opinion in this case and signed Findings and Decree precisely as prepared and submitted by appellee—altering only the name of the designated Special Master.

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The District Court wrote no opinion in this case and signed Findings and Decree precisely as prepared and submitted by appellee—altering only the name of the designated Special Master.

II.

STATEMENT OF THE CASE.

Succinctly stated, the questions involved in this appeal are as follows:

(1) Is the appellee entitled to recover the damages alleged from the appellants on the basis of fault and negligence in connection with the mooring of the Barge #4414, and the consequent puncturing of the bottom of the barge? In other words, was the mooring of the barge negligently done?

(2) Must the appellants bear the burden of proof to show that the towing and the mooring of Barge #4414 was accomplished with due and proper care and seamanship, and in connection with such burden must appellants account for the time and precise cause of the damage to Barge #4414?

(3) Was the District Court justified in concluding from the record of trial that the damage to Barge #4414 could occur in no other possible way and from no other possible cause than fault and negligence on the part of the tug, her master and crew, at the time of mooring the barge?

The first question is raised because the only direct, reasonable and credible evidence of what occurred at the material times was not impeached and was offered solely by the appellants. The only evidence offered by the appellee was in the nature of negative opinion and speculative evidence conditioned and based upon assumed facts not proven and upon presupposed hypotheses.

The second question is raised because appellee contended throughout that the burden of explaining what happened and of demonstrating that they were free from fault, rested upon the appellants because the barge was not manned by any of the appellee's agents or servants and was (until the tug left her at the mooring block) wholly in the physical custody and under the mechanical control of the appellants. Appellee further contended that the relationship of bailor-bailee was present in this matter.

The third question is raised because the District Court reached its findings and based its Interlocutory Decree upon what must be conceded to be supposedly logical deduction and a process of exclusion and a finding that it was impossible otherwise to account for the damage to the barge than through the fault and negligence of the ROCONA at or before the time she left the scene of the mooring, having secured Barge #4414 thereto.

III.

Assignment of Errors Relied Upon.

Appellant has assigned 27 errors (pp. 31-34) and relies upon them all. Nos. 8 and 24 are virtually identical, saving only that loss of cargo appears in No. 8 and only damage to the barge appears in No. 24. These latter two errors refer to the District Court holding the appellants responsible on the ground of negligence.

The assignments of errors fall broadly into three categories. Nos. 1-7 inclusive (p. 31); 10, 16, 19, 21, 23, 25 and 26 (pp. 32-34), are concerned with the first question involved, *i. e.*, the supposed fault and negligence on the part of the Rocona, her master and crew in connection with the mooring.

Nos. 8, 9, 11, 12, 13, 20, 22 and 24 (pp. 32-33), have to do with the second question involved, namely, the burden of proof and the extent of responsibility claimed to rest upon the appellants.

Nos. 14, 15, 17, 18 and 27 (pp. 32-34), relate to the third question involved, namely, the faulty deductive process of decision employed by the District Court in reaching its decision.

IV.

ARGUMENT OF THE CASE.

A.

The Tug Rocona Towed and Moored Barge No. 4414 Properly, Without Fault or Negligence, and the Record Is Devoid of Any Evidence to Contradict the Direct, Reasonable, Credible and Unimpeached Evidence That Due Care Was Exercised in Fulfilling the Rocona's Duty as Tower.

Errors 1-7 inclusive (p. 31); and 10, 16, 19, 21, 23, 25 and 26 (pp. 32-34), are applicable here and are as follows:

1. The District Court erred in rendering a decree for libelant in any particular, or at all.

2. The District Court erred in holding that respondent, the tug ROCONA, was improperly and negligently navigated, maneuvered or operated, so as to cause Barge 4414 to override the mooring float.

3. The District Court erred in holding that respondent, Tug ROCONA, approached the float with Barge 4414 in tow at an excessive and negligent speed under the circumstances then and there prevailing.

4. The District Court erred in finding that respondent, Tug ROCONA, negligently failed to stop the forward motion of Barge 4414 upon reaching the mooring float.

5. The District Court erred in finding that the respondent, Tug ROCONA, negligently and carelessly moored Barge 4414, in that during said mooring said Barge was allowed to override said mooring float.

6. The District Court erred in finding that the respondent, Tug ROCONA, failed to take reasonable steps to avoid causing Barge 4414 to override the said mooring float.

7. The District Court erred in finding that the damage to Barge 4414 was caused solely, proximately, or at all, by negligence of the Tug ROCONA, her Master, agents, or employees.

10. The District Court erred in holding that Barge 4414 was not moored safely and properly by respondents.

16. The District Court erred in failing and refusing to accept the testimony of witnesses for respondents and claimant.

19. The District Court erred in holding that the momentum of Barge 4414 at time of mooring carried it slowly forward into and over the mooring float.

21. The District Court erred in finding that all the allegations of the Answer filed by respondents and claimant which are inconsistent with the findings of fact made and entered by the District Court, are untrue.

23. The District Court erred in holding that respondent, Tug ROCONA, was negligent and in sole fault in the premises.

25. The District Court erred in holding that Guy F. Atkinson Company is entitled to recover from respondent, Tug ROCONA, and respondent, Johnson Western Company, all losses and damages sustained by libelant in the premises, together with interests and costs.

26. The District Court erred in admitting the opinion evidence of libelant's witnesses as to the cause of the damage sustained by Barge #4414, which opinion evidence

was specifically objected to and admitted over the objection of respondents and claimant.

Before discussing points of law or the various subdivisions of argument, it is important first to envision the type of case which is before this Court and which came on before the District Court for trial. The appellants, by virtue of the facts, were of course the only ones in a position to know the precise manner of mooring and no one knew of their own knowledge when or how the damage occurred. The appellee, by the necessity of the case, was forced to rely if it could, upon presumptions, probabilities, inferences and speculation.

Hence, the nature of the evidence offered by the appellants should justly be subjected to more than ordinary scrutiny. Appellants are unreservedly willing to have the evidence of their witnesses thus scrutinized and carefully weighed. On the other hand, appellants justifiedly contend that such evidence should not be wholly eliminated and disregarded unless good cause and sufficient reason exist.

A reading of the testimony given by the master and the two hands and particularly careful observation of the cross-examination of those witnesses conducted on behalf of appellee will, we believe, demonstrate without question that their evidence was given honestly, accurately and reasonably. Further, it was not impeached or shaken in any particular and its consistency and its logic were not impaired either upon cross-examination or by the force of evidence offered by appellee's witnesses.

In short, the appellants come before this court maintaining that the correct, reasonable, credible and unimpeached evidence shows without any question whatever, that due care and seamanship was exercised in every

particular by the tug and those in charge of her during the towing of the barge and during the time of her mooring.

Appellants likewise maintain that in the field of inferences, probabilities and speculation, the result is every bit as consistent with a finding of due care and proper conduct as with a theory of fault and negligence. In those circumstances, neither hypothesis is established. *Gunning v. Cooley*, 281 U. S. 90, 94; 74 L. Ed. 720, 724 (n. 6).

Whatever happened after the mooring, assuming of course that it was properly done, would not be at the risk of the tug, her owner or those in charge of her.

(1) The Relationship of Tug and Tow Is Not One of Bailment Regardless of the Fact That Consideration Is Paid by the Tow. The Action Before This Court Is Ex Delicto and Not Ex Contractu and the Standard Is Due and Ordinary Care Under the Circumstances.

Notwithstanding the fact that the libel was filed in two counts, one on a contract of bailment and the other on a theory of tort based upon negligence, this action can be regarded, under the established and settled law, *only* as an action *ex delicto*. The law is ample and clear that regardless of the fact that consideration is paid to the tower, the contract of towage does not raise a bailment. Also, it is undisputed that the standard of care is due and ordinary care under the circumstances. The tower is required to use due and ordinary seamanship under the circumstances and his obligation is no greater from the standpoint of standard of care. Though attempts have been made in the past to look upon the tower as an insurer of the safety of the tow, that approach has been unequivocally rejected by the courts.

The case of *New York Trap Rock Corp. v. Christie Scow Corp.* (C. C. A. 2), 162 F. (2d) 624, 627, is sufficient authority for the rule that a contract of carriage does not place the tow in bail to the tug and such rule extends to an unmanned craft such as is before the court in this cause. Starting at the bottom of page 626 of 162 F. (2d), the Court said:

“After some vacillation in the lower courts—as we showed in *The White City*—the Supreme Court definitely decided in *Stevens v. The White City*, that the doctrine that a contract of towage does not put the tow in bail to the tug, extends to cases where the tow is in an unmanned scow or barge, and *a fortiori* where a bargee is on board.”

For the point that this action is *ex delicto* and not *ex contractu*, and also that the tow is not in bail to the tug, we cite the case of *William Stevens v. The White City*, 285 U. S. 195, 201; 76 L. Ed. 699, 703, together with the numerous cases therein cited. That rule is indisputable on the basis of *THE WHITE CITY* case and we shall have occasion to discuss the case more fully at another appropriate point in this brief, because the whole opinion is of the utmost value in connection with the argument of this appeal. At page 703 of 76 L. Ed. Mr. Justice Butler said:

“Petitioner’s claim against respondent is not for breach of contract but one in tort. His allegations and proof in respect of the agreement between the parties were *made by way of inducement to his real grievance which was the damage to the Drifter* claimed to have been caused by negligence of respondent. It has long been settled that suit by the owner of a tow against her tug to recover for an injury to the tow caused by negligence on the part of the tug is a suit *ex delicto* and not *ex contractu*.” (Citing many cases.) (Emphasis supplied.)

Were it needed, additional authority for the foregoing rule is found in the case of *Waldie v. Steers Sand & Gravel Corp.*, 151 F. (2d) 129, 131, where in citing THE WHITE CITY case, above, the court said:

“But it must be remembered that she is not a bailee of the tow, and that the *tow must always establish her fault.*” (Emphasis supplied.)

(2) Discussion of Evidence of Due Care and Proper Seamanship re Mooring.

As previously mentioned, the only direct, reasonable and credible evidence of what occurred just prior to and at the mooring of Barge #4414 is found in the testimony of appellants' witnesses, Reeves, the master; Tomasic, the hand who did the mooring; and Gentle, the hand and winchman aboard the ROCONA. Brief reference will also be made to certain testimony given by one of appellee's witnesses, Jackson.

Shortly after the barge was made fast to the float appellee's employee, Jackson, made a tour of inspection of the mooring area “to look at all the barges and see how everything was laying” [p. 49]. He observed nothing unusual and he did pay *particular* attention to Barge #4414 then lying at the mooring float. His trip was for the purpose of seeing that all matters were secure [p. 62]. About an hour and a half later he observed that Barge #4414 was listing and efforts were then made to get the barge “inside to unload her” [p. 50].

It will be remembered that the load was an abnormal one—it was out of the ordinary—in that it was high at the bow and low at the stern. Such testimony was given by Captain Reeves, the master of the tug [p. 128]. It

is significant and important to keep in mind when studying the whole record of trial that:

(a) The trim of the barge as loaded by the appellee was abnormal, particularly in that she was high at the bow, and

(b) That at a time *following the mooring and after the departure of the libeled Tug ROCONA*, the barge was observed by one of appellee's employees and witnesses, *charged with the duty of determining such fact*, to be in no trouble, properly moored, and apparently riding safe and easy at the float.

The log of the ROCONA [p. 166] discloses that one hour and a quarter was consumed between the time of entering the harbor at the breakwater and the departure following the completion of the mooring operation. The tug entered the harbor through the east entrance to the breakwater. Thereafter she cast off to the charge of another tug, a second barge which had been towed across the Catalina Channel astern of the barge in suit. At the time of the transfer of the after barge to another tug, both Barge #4414 and the one to be cast off were practically at a standstill in the water. The line to the #4414 from the ROCONA was shortened and the tug proceeded with the single barge in the direction of the mooring float [p. 129].

When approximately a thousand feet away from the float, the ROCONA slowed and backed down to let the stern of the tug come easy to the barge. Thereupon, the hand, Tomasic, stepped aboard carrying a pike pole [p. 131]. Reeves, the master, picked out the float to be used with the ship's spotlight, and when distant about 100 to 150 feet from the mooring block, he shut off the tug's power and drifted [pp. 131-133, 141-142]. After shutting off

the power at about 100 feet from the mooring block, the stern of the tug (off to the port side of the barge) was “kicked down” so that the tug lay alongside the barge with no strain on the latter but still in a position to check the headway of the barge if she had headway. The barge was permitted to drift up to the mooring [p. 132].

From about 60 feet away [p. 145] Reeves, the master, observed Tomasic on the barge “fishing” for the mooring pendant attached to the float. He could see that Tomasic was having difficulty taking it aboard—“It took him quite a little while” [p. 145]. At that time there was no headway on Barge #4414, *i. e.*, “she was at a dead stop, other than the surge back and forth” [p. 134]. After Tomasic, aboard the barge, reported everything all right, the tug came alongside, threw off the tow wire, and Tomasic came aboard with his pike pole. Thereupon, Reeves played the ship’s spotlight the length of the barge and departed from the scene. He observed nothing abnormal or unusual. After Tomasic put the mooring pendant over the bit on the barge, Captain Reeves did not thereafter tighten the line between the barge and the tug [pp. 133-134]. At the time, Captain Reeves could see that the top of the float was approximately level with the surface of the water and had green moss on it. To him that meant that she must have been waterlogged, a very old mooring, and that she must have been almost straight up and down on her anchor chain [pp. 135-136]. The greatest speed that was attained between the time of transferring the first barge to another tug and the time of mooring Barge #4414, was three-quarters to one knot per hour [pp. 139-140].

Tomasic, the hand who did the mooring while aboard Barge #4414, had had 12 years experience as a seaman

and at the time of the mooring had attended or assisted at moorings of barges of the type in question for a period of seven or eight months [pp. 148, 165]. After the tow line was shortened when the tug was transferred, the line to Barge #4414 was about 35 or 40 feet long. It was about one-quarter or one-half mile from the place of delivering the other barge to the other tug, to the mooring [Point "T-1" to "T-2" on appellee's Exhibit No. 4, *i. e.*, harbor chart]. The mooring float ("T-2" on the chart) was about 1500 feet off the mole or landworks ("T-3") [pp. 152-155]. The weather was normal and the surge and ebb and flow of the tide and the harbor water were normal [p. 156]. The witness, Tomasic, saw the float when the light from the tug was played upon it a distance of about 750 feet. There were no other unoccupied or available floats for mooring purposes in the vicinity [p. 157]. At about 200 feet from the float, the captain stopped the tug engine and the boat "worked" ahead slowly [pp. 157, 172]. At the time of the mooring and after Tomasic had been placed aboard the barge, she was "dead in the water" [p. 163].

The barge (from the distance of 150 to 200 feet away from the mooring when the engine of the tug was cut off) drifted toward the mooring float on a course of approach so that if she had kept on, the float would have been on the barge's starboard side. The line to the tug was not taut at such time and the barge did not go by the mooring block or float [pp. 157-158, 162, 180].

It took Tomasic five or ten minutes to get the mooring pendant attached to the float out of the water so that it could be placed around the mooring bit on the forward, starboard corner of the barge. During the "fishing" operation the starboard corner of the barge was toward but

not touching the float. The witness did not go aboard the float to aid himself in “fishing up” the fouled pendant because it was too slippery from moss, which was of the long hairy type [pp. 158-160].

At the time of the struggle to get the pendant out of the water and fastened to the barge, the Tug Rocona was over on the port or left side, approximately parallel to the barge. Tomasic observed Captain Reeves in the pilot house looking through the window, which was open [pp. 161-162].

In lieu of summary of his testimony, we quote the following direct testimony of Tomasic, from page 162:

“Q. Mr. Tomasic, as you recall that incident that night and what occurred, did or did not the Barge 4414 override that mooring float? A. Absolutely not.

Q. How did you know that it didn’t? A. Because if that barge would have overrun that mooring float I would never have got ahold of that cable unless we made another pass at it.

Q. Did you feel any bump or any jar aboard the barge? A. No, sir.

Q. Did you hear any thud or crash or cracking? A. Absolutely nothing, sir, outside of the normal noises that a barge always makes.

Q. That is a slapping sort of thing, isn’t it? A. That’s right.”

After Tomasic reboarded the Rocona the craft made a circle of the mooring barge, playing her spotlight upon the barge and the mooring float [pp. 181-182]. In answer to the court’s question “Did you observe the barge *and the mooring* as you made the circle?” (emphasis supplied),

Tomasic answered "Yes, sir," and when asked "By what light did you observe it," the witness replied to the court:

"Well, as we made our circle pretty close I was standing at that time on the after part of the deck, back by the tow winch, I could observe it through the side lights of the tug. Captain Reeves probably seen it in the searchlight" [p. 182].

Appellants' next witness, Gentle, was a towboat man, with about 90 days of service at the time of the occurrence in question, and was serving aboard the ROCONA as a deckhand and operated the winch. The ship's engineer was below decks at the engine control during all of the material times [pp. 188-189].

About a quarter to a third of a mile inside the break-water the after tow was cast off and delivered to another harbor tug. The line to the Barge #4414 was shortened to about 60 feet between the two craft. (Tug ROCONA and Barge #4414.) They proceeded at a "slow bell" to the mooring. The speed under "slow bell" was one-half to three-quarters knots per hour [p. 195].

Gentle observed the float as the barge slowly approached with the starboard side of the barge toward the float, *i. e.*, as the ROCONA with her tow approached the float, she was running off towards the port side of the float [pp. 195, 202].

Being at the after winch, the witness saw the mooring approaching the starboard side of the barge and then observed the tug, having moved off to port, backing down to where "we were lying approximately alongside, just a little bit forward of the bow with the stern approximately 20 or 30 feet aft of the bow" [pp. 195-196]. There was no pulling on the line to the barge as the tug lay alongside during the mooring operation, *i. e.*, there was no "pull-

ing”, only “maneuvering” to keep the barge in a direct line, and being off to the side of the barge the tug could swing her or just come up against the line so as to swing the barge. The witness pointed out that one could not hope to shut off power 150 or 200 feet away and have the barge run directly in a straight line “right to the float” [p. 196]. Mr. Gentle did not actually see Tomasic attempting to or in the act of mooring the barge to the float, because his view was obscured [p. 197].

Before the mooring was made, the witness saw the float and observed not more than three inches of her above water. Upon inspection of the float the witness saw long hairy type of moss thereon, although he saw very, very little on top of the float [pp. 198-199, 204].

It is significant that forty-eight hours later, Gentle observed that several pieces of 4 x 4 had been built in a bulkhead around the ring on the top of the appellee’s float—apparently as a protection against damage being caused by the iron ring on the top of the float [pp. 197, 198-199].

The witness did not pay any attention to observing the completed mooring of Barge #4414 to the float, when, thereafter, the tug circled the barge—he just knew that they did circle it [p. 203].

We respectfully urge the court to read all of the testimony of the witnesses, Reeves, Tomasic and Gentle, and especially the competent cross-examination of those people, conducted by appellee’s most able counsel. It is because of the impressive candor and forthrightness of the testimony, that appellants are confident that this court will accept that evidence in preference to the speculation, opinion and attempted reconstructed circumstances testified to by appellee’s witnesses.

Appellee introduced the testimony of four witnesses, only *one* of whom was an experienced marine man and marine surveyor.

Permit us now briefly to consider the qualifications, abilities and the technical standing, if any, of each of those four witnesses for appellee whose testimony was apparently accepted by the trial court to the exclusion of the testimony of the master of the vessel and his two hands:

The first witness presented by appellee was Mr. Jackson, a real estate agent [p. 40]. At the time of the damage to Barge #4414, Jackson was employed by appellee as superintendent of the "graveyard" shift in charge of unloading and loading rock barges [p. 41]. He was charged with the precise duty of seeing that nothing unusual existed after the barges had been brought in and moored, and it was he, also, who actually observed the barge in question after she had been moored, and found her to be secure [p. 62]. Mr. Jackson had never served aboard ship, held no maritime license, and had merely *seen* barges moored "hundreds of times" [pp. 53, 60]. On the basis of such qualifications he was permitted, over objection [pp. 52, 53], to give opinion concerning the proper methods of mooring and the dangers associated therewith [pp. 53-54, 55-56]. That sort of testimony and that character of opinion is wholly useless and the objections should have been sustained. We submit that the court must have been unduly impressed and carried away by the glib, lengthy and very willing and voluntary dissertations of Mr. Jackson. THE ONLY direct evidence from that first witness called by appellee, related to his two patrols of the mooring area and his inspections of the bottom of the damaged barge the following day.

The next witness called by appellee was a carpenter, Mr. Bach. At time of the occurrences in suit he was yard superintendent [p. 72]. Mr. Bach testified in detail to the type of construction of mooring floats and their appurtenances [pp. 73-75]. He likewise inspected the damage to the holed barge the next day. However, upon his direct examination he placed the broken planks five feet from the *port* side [p. 77], but upon his cross-examination he altered his recollection to place the hole nearer to the *starboard* side [p. 83]; clearly not a wilfull change of position but certainly a clear indication of the unreliability of his memory. Mr. Bach was properly not called upon for his opinion concerning cause, time, etc., of the damage.

The next witness presented by the appellee was Mr. Rainer, now a superintendent upon a sewer job [p. 83]. At the time of the accident giving rise to this cause, Mr. Rainer was an assistant project manager at appellee's mole job. He assumed full responsibility for towing of rock at the job in question, including the dispatching of towboats. Such responsibility extended from the time the boat left with the empty barges, went to Catalina, were loaded, and then towed to the mainland, and he was responsible until the barges were made fast [p. 90]. Rainer, both on direct and upon cross-examinations, unequivocally assumed full responsibility and claimed full power of direction and control of the barges, which would include their mooring. Appellee's counsel went further and tried for page after page of the record to qualify Rainer as an expert to give his opinion upon the cause of the damage in question [pp. 86-88, 90-100]. At first the court consistently sustained objections to Mr. Rainer's opinions, but finally, in a confused sort of way [p.

99], permitted Raimer to give his opinion concerning the impossibility of towing the barge across the Catalina Channel with a hole in her hull of the type that was observed by the witnesses. So far as we are able to find in the record of Mr. Raimer's testimony, he never did give an opinion concerning the cause of the damage. Hence, Mr. Raimer's testimony, in net effect, cannot be said to have added anything, nor would the trial court be justified in resting any of its findings upon such testimony.

The one qualified marine man presented as a witness by appellee was Mr. Scheibe, an experienced marine surveyor. Mr. Scheibe's opinion was based upon an examination of the marks on the bottom of the barge and the hole in the hull, and upon nothing else save his attendant knowledge of the action of the waters in the harbor. In brief, his opinion was that the barge would not override the float "with the ordinary and usual conditions of the current and tide and surge in the harbor . . ." [p. 109]. *That was the sum total and the extent of Mr. Scheibe's opinion.* He did not state at any place in his testimony that the barge was pulled over or in any other manner forced upon the mooring float. When Mr. Scheibe testified [p. 107] that in his opinion "the barge overrode a mooring float and that the eye—the "U" bolt punctured the bottom planking," he did no more than to support some of the facts already agreed to in the Pre-Trial Stipulation, *viz.*: The hole in the bottom of the barge was caused by an object the shape of the U-bolt on the float. That sort of testimony does not even hint at *cause* as "cause" is here being sought. When Mr. Scheibe ruled out the action of wind and waves, currents and surges as the cause, his opinion by no means pointed to a

negligent job of mooring or improper action in that regard on the part of a towing tug. It is significant to note that Mr. Scheibe on cross-examination, in effect, agreed with the feasibility and possibility of appellants' theory relating to the short anchor chain on the float as a possible means of keeping the float too far submerged and thus making it more possible for a barge, with trim such as was the trim of Barge 4414 (high at the bow and low at the stern), to come afoul of the top of the float. He was asked [pp. 112-113]:

“Would it alter your opinion if added to the circumstances upon which you based the other opinion were the fact that the anchor chain on the float were such as to bring that float below the water surface at some time or another, would that alter your opinion?”

Witness: My opinion was based on normal conditions with the float on the water.

Question by Mr. Scully: Yes.

A. Had the anchor chain been too short with that float submerged, then anything could happen.

Q. She could possibly get afoul of that ‘U’ bolt, couldn’t she? A. Definitely that float would be under water.”

Further, Mr. Scheibe said that it was “very probable” that the barge arrived at destination (the mooring block) carrying free water in her hold [p. 114]. Add that to Mr. Scheibe’s prior explanation [p. 110] about what free water will do to a craft at anchor as it shifts back and forth in the hold, and we have another possible condition based upon the physics of the problem which could result in the barge getting on top of the probably partially submerged float.

Once more we see the utility and appealing logic of that line of cases holding that proof of two hypotheses, for only one of which a defendant may legally be held responsible, has no tendency to establish the truth of *either* hypothesis and a plaintiff in such circumstances fails to sustain the ultimate burden of proof which never shifts from his shoulders.

White v. Spreckels, 10 Cal. App. 287.

In view of the state and character of the evidence in this record, and particularly recalling that appellee, concurred with by the trial court, rested upon evidence given by a real estate broker, a sewer project superintendent, a carpenter and one qualified marine surveyor who gave no positive opinion but testified on the subject of cause only in the *negative*, we submit that appellants and this court, should they desire to indulge in such, may properly likewise speculate as to what caused the hole in the bottom of Barge 4414. We therefore offer the following:

The evidence shows without dispute that Tomasic, the hand who was put aboard the barge, had ample opportunity to and did actually spend considerable time “fishing up” the fouled mooring pendant and securing it to the sampson post on the barge. It is unavoidable therefore, that the barge **MUST** have been very slow in the water if not actually stopped dead. That *in itself* shows due, reasonable and proper care and seamanship in the circumstances and once that is shown credibly and satisfactorily by the evidence, as we submit it was, appellants should be absolved from all responsibility. It is highly probable that any surging of the water would place the float in front of the barge at some time or another and with the barge riding high at the bow, a passing steamer or any other of a thousand possible forces might force the float

against the forward rake of the bow and impel the barge upon the float. There are a myriad of ways in which the float could get in front of the barge and an equally unknown number of outside causes in a busy harbor which could then so disturb things as to cause the barge to come afoul of the float and the float's U-bolt.

(3) The Weight to Be Accorded to the Findings and Decree Entered in the District Court.

Plagiarizing this Honorable Court's language in the case of *United States v. Johnson*, 160 F. (2d) 789, 792, we are fully aware that the record and the findings below come to this court "encased in their usual armor." Appellants have prosecuted this appeal with full cognizance of the repeated and established principle that the findings of the trial court signed, after a trial in which witnesses personally appeared, are given great weight. Nevertheless, it is equally the law established by the Circuit Court of Appeals for the Ninth Circuit, and in other circuits, that the weight to be given to the trial court's findings varies with the character of the evidence given below.

The old case of the *Ariadne*, 13 Wall. 475, 479, 20 L. Ed. 542, 543, has been reaffirmed many times and is still respected in this and in other circuits. In answer to the broadside always fired with great gusto by appellees to the effect that there is a presumption in favor of the findings below when entered upon conflicting evidence, the United States Supreme Court, in the *Ariadne* case, above, said:

"We are not unmindful that both the Circuit and District Courts came to a conclusion differing from ours as to the alleged fault of the steamer.

Their judgments are entitled to and have received our most special full consideration. Their concur-

rence raises a presumption, *prima facie*, that they are correct. Mere doubts should not be permitted to disturb them. But the presumption referred to may be rebutted. *The right of appeal to this court is a substantial right, and not a shadow. It involves examination, thought and judgment.* Where our convictions are clear, and differ from those of the learned judges below, we may not abdicate the performance of the duty which the law imposes upon us, by declining to give our own judicial effect.” (Emphasis supplied.)

This court quoted language from the *Ariadne* opinion in the United States Supreme Court in the case of the *Ernest H. Meyer*, 84 F. (2d) 496, 501, and reaffirmed the principle therein by pointing out that Admiralty Rule 46½, 28 U. S. C. A. (following Sec. 723), relating to the making of findings, did nothing more than change the old rule under which the District Court’s admiralty decree was regarded as wholly vacated by an appeal. The gist of this court’s decision in the *Ernest H. Meyer* case, *supra*, is that the Circuit Court in such an appeal as now before it, will weigh the evidence with a *rebuttable prima facie* presumption that the District Court findings are correct. The value of the presumption is affected by the amount of testimony below and the character of the evidence. In the case at bar, credibility is not primarily under investigation. It is more like the case of one tried upon depositions because this Honorable Court is called upon to review the accuracy and correctness of the trial court’s deductions and rationalization. We are not unmindful of the fact that the evidence in the case of the *Ernest H. Meyer* was by deposition. Even so, however, the rules on the point of the weight to be given to trial court findings in an Admiralty appeal are well an-

alyzed, discussed and entirely applicable in the instant inquiry.

The *Russell No. 3*, 82 F. (2d) 260, 263, was also quoted by this court in the *Ernest H. Meyer* case, above. The correctness of a commissioner's finding was under attack there. Judge Learned Hand said:

"While it is entitled to be treated as 'presumptively correct . . .' there is a point after which we must assume responsibility for the facts; we think this is such a situation . . ."

The District Court decree was reversed.

Reverting to a discussion of the case of the *Ernest H. Meyer*, 84 F. (2d) 496, Mr. Justice Denman of this Honorable Court analyzed *McCrea v. U. S.*, 294 U. S. 382, 383; 79 L. Ed. 933, and reached the conclusion that the present rule of the United States Supreme Court still means that the *whole evidence* upon an Admiralty appeal is to be weighed and that the record is not to be examined merely to discover *some* evidence to justify the District Court's findings, *i. e.*, the proceeding upon Admiralty appeal is not the same as that had upon a Writ of Error.

In *Great Atlantic & Pacific Tea Co. v. Brasileiro (The Pocone)*, (C. C. A. 2d) 159 F. (2d) 661, Certiorari Denied, 91 L. Ed. 1849, 331 U. S. 836, appeals were taken from a decree in a proceeding by an owner to limit liability for damage by fire and water to the cargo carried by the *POCONE*. The trial court found the master and crew to have been negligent, but refused to impute fault or negligence to the owner through owner's Traffic Manager and Port Engineer. The pivotal issue important to our inquiry, and which makes the case germane to the case at bar, was the holding below (reversed on appeal), to the

effect that the owner's Port Engineer, Borges, was not negligent and that therefore the owner of the vessel was exonerated. What was done and what occurred at the material times in connection with the fire aboardship was fully shown by the record below.

Judge Hand, writing for a unanimous court, reversed and remanded the case because of disagreement with the finding by the trial judge to the effect that Borges was not negligent. That portion of the holding states (p. 665 of 159 F. (2d)):

"This runs counter to one of the findings of fact, so named; but a finding of negligence is not a finding of fact which must be 'clearly erroneous' to be subject to review. It sets a standard of conduct, which while it is applicable only to the concrete situation, involves a choice between, and an appraisal of, two contrasted values—the needed precaution and the possible damage. It is true that, when the wrong is not deliberate, the occurrence of the loss or damage by hypothesis involves a factor of probability and it may be argued that probability is a question of fact. Even so, after the damage has been discounted by the risk, the decision involves a comparison of the contrasted values: the necessary precautions and the stake; and that in turn demands the setting of a standard, a norm, an imperative, which is the usual hallmark of a jural act. Certainly such a decision is not like a decision of fact uncolored by any element of choice or fiat. We are therefore free to exercise our own judgment upon Borges's conduct and we hold that he was negligent . . ."

Neill v. Hill, 32 Ga. App. 381, 123 S. E. 30, is an apt authority on an appeal such as this:

"(a) The testimony of witnesses who swear positively, and are not otherwise impeached or discredited,

should not be discarded merely because they are related to the party in whose behalf they testify, although such relationship is proper for the consideration of the jury when there is other matter by reason of which they may legitimately question the credibility of the testimony. (Cases cited.)

(b) A fact cannot be established by circumstantial evidence which is perfectly consistent with direct, uncontradicted, reasonable and unimpeached testimony that the fact does *not* exist. (Cases cited.)” (Emphasis supplied.)

In terminating discussion of this phase of argument appellants urge this court to give to all of the evidence that independent examination, thought and judgment to which the United States Supreme Court has said an appellant in Admiralty is entitled and to which this court has on so many occasions consistently adhered. We are confident that when the clarity, reasonableness and convincing credibility of the witnesses having direct knowledge of the facts is examined, the contrast with the unsatisfactory evidence introduced by appellee will leave no question in the court’s mind but that the trial court’s findings and decree cannot possibly be upheld on any reasonable or logical basis.

Finally, we hope that the court will not lose sight of the fact that the findings and decree were neither prepared nor altered in any material respect by the court. They were signed as drafted and presented by appellee’s counsel. That practical aspect is important and properly considered when the contention is advanced that the trial court’s findings and decree are controlling. Every attorney can be expected, in such circumstances, to try to protect his success in the trial court by drafting “air tight” findings.

B.

Appellee Wholly Failed to Establish by Direct Evidence or Otherwise That the Damage to Barge No. 4414 Proximately Resulted From a Cause for Which Appellants Were Responsible or During the Period Terminating With the Due and Proper Completion of the Towing Engagement, i.e., the Mooring.

Errors 8, 9, 11, 12 and 13 [p. 32], 20, 22 and 24 [p. 33], are applicable here and are as follows:

8. The District Court erred in finding that the loss of the cargo of Barge 4414 and the damage to Barge 4414 were caused solely, or at all, by the negligence of respondent, Tug RoCONA.

9. The District Court erred in failing to find that libelant was negligent in respect to the manner, method and condition of loading Barge 4414, and in failing to find that libelant was negligent in providing, furnishing, and maintaining the mooring float, all as alleged in the Answer to Libel filed by respondents and claimant.

11. The District Court erred in holding that Barge 4414 sustained damage to her hull during the time said Barge was in custody of respondents, and prior to the completion of delivery of said Barge to the mooring float furnished and maintained by libelant.

12. The District Court erred in holding that Barge 4414 sustained damage prior to the time respondent, Tug RoCONA, departed from the scene of the mooring.

13. The District Court erred in failing to find that the anchor chain attached to the mooring float was too short to constitute a safe and proper mooring facility.

20. The District Court erred in finding that Barge 4414 began to take water and within an hour after mooring was discovered to be in a sinking condition.

22. The District Court erred in holding that neither Barge 4414 nor libellant, or either of them, committed any fault or negligence in respect to the matters and things alleged in the Libel.

24. The District Court erred in holding that the damage to Barge 4414 was proximately caused solely by the negligence and fault of respondent, Tug RoCONA.

This subdivision of appellants' brief deals with appellee's failure to sustain that ultimate burden of proof of negligence which always rests upon the plaintiff and never shifts. The old and familiar rule of "he who affirms must prove" is inherent in this action as it is in all such actions of similar character. Rules of presumption and inference, which are discussed more at length in connection with the doctrine of *res ipsa loquitur* under Subdivision C of this brief, are merely ancillary and subordinate aids to proof. It is settled that presumptions and inferences are never *in themselves* substitutes for evidence and proof, as such.

It will presently be demonstrated that there is no presumption of fault from the mere happening of an accident. However, it is first important to recognize the limits of duty and responsibility which rested upon the tug and those in charge of her. Once the "RoCONA" brought her tow (Barge 4414) to the place of final destination and moored her safely to an apparently safe facility, any damage *thereafter* occurring and not proximately related to the time and the act of mooring, is at the risk of the barge and her owners and not that of the tug.

In the *Eastchester*, 20 F. (2d) 357, 358, the charge was negligent mooring in an unsafe berth. The Circuit Judge writing the opinion said:

“The tug having fulfilled her towage contract by delivering the barge to the consignee, without objection to the berth by consignee or by bargee, the risk in allowing the barge to remain in the position she was in when the tug departed was not the tug’s.”

There is not one word of evidence of a direct character, or of a nature which would justify a logical inference to the effect, that the hole in the bottom of the barge occurred before the departure of the “ROCONA.” On the contrary, all reasonable evidence, especially the testimony given by appellee’s witness, Jackson, who saw the barge at the float at a time when she was in no difficulty and after the mooring was completed, points to the occurrence at a time subsequent to the completion of the mooring.

The case of *Schoonmaker-Conners v. New York Tidewater Gravel Corp.*, 11 F. (2d) 470, was cited as authority for the quotation set forth above from the *Eastchester*. The Circuit Judge writing the opinion said:

“If there was a risk in allowing the barge to remain in the position she was in when the tug departed, it was not the tug’s (cases cited). The tug’s duty was to take her as near to the dock as she safely could. There was no obligation to stand by.”

Although a District Court case in which no appeal was apparently taken, *King v. Red Star Towing and Transportation Co.*, 48 F. (2d) 633, 634, 635, is a most appropriate citation. Its language and the clear logic of the opinion should have its appeal to an Appellate Court.

The sole witnesses for the libellant in that case were the owner, who was not present at the time of towing, and a marine surveyor who subsequently surveyed the damage. Citing *Aldrich v. Penn. R. R. Co.*, 255 Fed. 330, 331 (C. C. A. 2d), the District Judge stated:

“The mere fact that the Mifflin sank sometime after she had been tied up, and the tugs had departed, is not sufficient to prove negligence.”

Further:

“The only duty resting on respondent was to take the Mifflin to a reasonably safe berth and, she having no captain on board, to tie her up in a seaman-like manner. The *Brittania* (C. C. A.) 252 Fed. 583 . . . If respondent was without fault in placing her at her berth, the subsequent cost of raising her, to get her out of the way, cannot be charged to it.”

Obviously, appellants are not here contending to this Honorable Court that had the evidence shown or justified an inference that the “ROCONA” and those in charge of her did not perform properly when mooring Barge 4414, liability would not rest upon the appellants. We submit, however, that not only was there no direct evidence and no evidence justifying such inference, but that the evidence greatly preponderates in favor of appellants on the issue of due care and proper seamanship at time of mooring.

It is unnecessary to extend further the citation of authorities that in order to hold the appellants on the basis of negligence the damage must have been proven to have resulted from an act or omission for which appellants were responsible. The record is wholly devoid of evidence on

that score. The tug's duty as tower ceased when it moored the barge properly to the mooring facility provided by appellee. From the speculative standpoint, the fouling of the barge on the mooring float likely occurred by reason of the float being held either partially below or just at the level of the water. If that be the case, as is entirely probable, appellee cannot complain, because the mooring belonged to and was furnished by the appellee.

Although liability was found to exist upon the facts of the case, the *Ashveaubemie*, 3 F. (2d) 782, 783, clearly affirms the universal rule that the burden of proving negligence perpetually rests upon those who seek to establish the tug's liability. Negligence is *never* presumed from the mere happening of the accident. The case also holds that the tug is not an insurer of the safety of the tow, nor is she responsible for errors of judgment on the part of the master, if a competent seaman exercising due care.

Significant of the mental approach to the proof and to the case at large on the part of the learned trial judge in the District Court, and from which we submit he was never able wholly to divorce himself, is his question when the evidence was concluded concerning the application of the rule of "highest degree of care" to the case [p. 209].

We have cited *Aldrich v. Penn. R. R. Co.*, 255 Fed. 330, above. That case was decided in the Second Circuit in 1918. The familiar universal rule of burden of proof to prove negligence continually resting upon the one who asserts it was applied and affirmed upon the following facts:

The master of the tow testified that when he went to bed the barge was in good condition and undamaged at the place, where it was subsequently discovered, it had

met with violence. The tow was tied up and the first information concerning a collision was had at 8:00 o'clock the following morning, when, upon coming on deck the master's attention was called to a hole "large enough to walk in and out"—on the port side. Three planks running fore and aft were broken. The testimony was silent as to a collision of any character and the master of the tug which did the towing testified that there was no collision or bumping of any character. The appellant sought to infer negligence from those circumstances. The Circuit Court affirmed the District Court and refused to make such an inference on the ground that the appellant failed to sustain the burden which was cast upon him of proving negligence in the performance of the towing operation.

We think that the above case is a very strong one on its facts. It will be observed that in affirming the District Court's decree the Circuit Court in the *Aldrich* case, above, did not rest such affirmance upon the weight of findings below, nor upon the conclusive nature of the District Court's decree. It weighed the evidence directly and reached an independent judgment.

Another applicable authority is the case of *Higgins, et al., v. Gypsum*, 67 Fed. 612-614 (C. C. A. 2d). A collision occurred between two sailing vessels. The facts were undisputed, THE TARBELL, loaded, was sailing close-hauled on the starboard tack. The GYPSUM PRINCE was running free on the port tack. THE TARBELL was the privileged vessel. It was the duty of the GYPSUM PRINCE to keep out of her way. For a collision happening under those circumstances the burdened vessel (the GYPSUM PRINCE) is to be held responsible unless the cause was inevitable accident or some fault of the privileged ves-

sel. The District Court found that both vessels were at fault. The Circuit Court reversed the decree below and held the GYPSUM PRINCE to have been solely responsible. The Circuit Court considered the evidence in all its aspects in a careful and analytical manner. The District Judge said that it was extremely difficult from the testimony to find any satisfactory and certain explanation of how and why the collision occurred. He therefore indulged in theorizing and deducing (as did the learned trial judge in the case at bar), in an effort to determine the cause from the circumstances.

The following quotation is from the Circuit Court's opinion and illustrates that court's view of how the evidence *should* be weighed. From the case of *The Alexander Folsom*, 52 Fed. 403, the Circuit Court, in *The Gypsum Prince* case, quoted:

“‘The established rule is that the testimony of officers and witnesses as to what was actually done on board of their own vessel *is entitled to greater weight than that of witnesses on other boats, who judge or form opinions merely from observations.*’” (Emphasis supplied.)

The Circuit Court (reversing the District Court), then went on:

“This does not mean that a vessel is to be held free from an alleged fault whenever her officers and crew testify that they did not commit it. But when their evidence is given under circumstances which are calculated to bring out an independent story from each witness, when it is in accord with what would have been the natural course of events, when it is direct and positive and consistent, it is a safe rule to follow that it shall not be set aside because the testi-

mony of observers on the other vessel as to color and bearing of lights will not harmonize with it. And even on appeal, in a case where the district judge has seen and heard some of the witnesses, such testimony should still be accorded its proper weight, especially when, as in this case, his finding has been apparently in part induced by a misplacing of the testimony.”

In the *Pride*, 135 F. (2d) 999 (C. C. A. 2d), the District Court’s decree was reversed on the ground that the evidence did not sustain the findings, that damage to the barge resulted from navigating too closely to consignee’s dock. There the finding of fault rested “upon a possibility which appears to approach a likelihood insofar as no other cause of the damage was shown.” Nevertheless, the court said:

“However, such thoughts as these but show how much speculation must underlie any attempt on the evidence in this record to attribute the injury to the barge to some specific cause. This leaves the libelant without proof of any cause of action. The *Tracy* was not an insurer of its tow and can be held only if its negligence is affirmatively shown (citing several cases).”

Appellants have previously referred to the failure of the evidence to show *how* and *when* in reference to the cause and time of the damage to Barge 4414. The District Court’s findings and decree (both signed in form prepared by appellee), when analyzed in the light of the evidence in the record, obviously proceed upon the theory that the “how,” the “when” and the other constituent elements of the case relating thereto, were for the appellants to establish, identify and explain. Under the

settled law which has been shown above, and which hardly needs citation of authority, such an approach to this case is fatal to a finding of liability. The reason?—because the ultimate burden of proving negligence never shifts from the libellant (appellee) regardless of interim shifting of the burden of going forward with the evidence. It certainly was not a duty of appellants to identify the precise cause *or* time of the injury to the tow. To rest content with the statement that the cause of the hole in the barge was the U-bolt on the mooring float would be pure superficiality and sophistry. The quest in the case is not the instrumental cause but the *legal* cause.

The appellee has not met the clear requirements of a plaintiff in a tort action by merely proving the nature of the physical damage and the opinion of a marine surveyor that the damage *was not caused* by the action of the tide and surge of the water. In just a few words, that constitutes the entire extent of appellee's proof in the District Court.

Gunning v. Cooley, 281 U. S. 90, 94, 74 L. Ed. 720, 724 (Note 6), cited in *The White City*, 285 U. S. 195, 76 L. Ed. 699, was not in Admiralty but it was a negligence case and burden of proof was one of the points decided. Supported by other respectable authorities it quoted Mr. Justice Taft, who was then sitting in the Circuit Court, speaking in *Ewing v. Goode*, 78 Fed. 442, 444, as follows:

“When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither.”

We have already referred to the case of *White v. Spreckels*, 10 Cal. App. 287, deciding virtually the same

point, *i. e.*, when it appears that the injury may have been occasioned by one of two causes, for one of which defendant is responsible, but not for the other, plaintiff must fail if the evidence does not show that the injury was the result of the former cause, *or leaves it as probable that it was caused by the one as the other.*

The same idea was the subject of a well written opinion in *Hughes v. Cincinnati, etc., Ry. Co.*, 91 Ky. 526, 16 S. W. 275. The producing cause of death was in doubt. Said the court:

“We are left to theorize as to it. One suing to recover for damages for injury arising from another’s neglect must offer some testimony conducing to show that it was so occasioned. Negligence cannot be presumed in a case like this one. The presumption is the other way . . . He (plaintiff) has merely presented two or more states of case upon which one may theorize as to the cause of the accident.”

In the *Lizzie D. Shaw*, 47 F. (2d) 820, the Circuit Court for the Third Circuit reversed the District Court and ordered the libel to be dismissed. Following a detailed analysis and consideration of the record below, the Circuit Court concluded that those who asserted negligence (the libelant) failed in the “central phase of the controversy” by failing to sustain the burden of proving negligence on the part of those in charge of the tug. The opinion stated that the tug should be absolved if the master acted “not with the highest degree of skill and care . . . but with reasonable skill and care and in the exercise of the reasonable discretion of experienced navigators.” Negligence not being presumed, appellee bore the burden of negating that issue—and failed to sustain such burden.

C.

The Deductive Process of Decision Employed by the Learned Trial Judge Is Fatal to the Findings and Decree Because Founded Upon Unproved Speculation and Conjecture. There Is Nothing in the Record to Show When the Injury Occurred.

(1) *Res Ipsa Loquitur* is not applicable because:

a) Appellants were not shown to have had exclusive control of the “instrumentality” at time of injury.

b) The facts do not warrant an inference of negligence on the part of appellants.

Errors 14 and 15 [p. 32]; 17 and 18 [p. 33], and 27 [p. 34], are applicable here and are as follows:

14. The District Court erred in presuming and inferring that respondents were negligent and through such negligence caused damage to Barge 4414, upon the basis of the speculation, conjecture and inference, which was not proven, that the said Barge 4414 sustained such damage prior to the time the respondent, Tug ROCONA, departed from the scene of the mooring.

15. The District Court erred in placing the burden of proof upon respondents and claimant to show that respondents were not negligent in towing and mooring Barge 4414.

17. The District Court erred in applying the presumption of *prima facie* negligence against respondents and claimant upon proof of circumstances by libelant.

18. The District Court erred in holding respondents to have been negligent in the mooring of Barge 4414 and in holding that said respondents caused damage to

said Barge, by basing said holdings and findings upon speculation and conjecture.

27. The District Court erred when, in effect, it implicitly applied the doctrine of *res ipsa loquitur* in deciding this cause.

It is manifest from the findings and the evidence in the record that the trial judge necessarily based his decision not upon direct evidence of the supposed negligence, but upon what he reasoned to be compelling circumstantial evidence, inherent probabilities, deductions and inferences.

Appellants steadfastly maintain that the learned judge's process of decision was inherently faulty and could be no more than speculation and conjecture.

Much of the argument and many of the cases in the next preceding subdivision B of this Section IV of the brief (ARGUMENT OF THE CASE) are germane to this subdivision C. The court having that material in mind by the time it reaches this portion of appellants' brief, our conscious effort will be exerted to avoid unnecessary repetition. As argument progresses hereunder the partial blending between subdivision B and this subdivision C will be apparent.

Essentially prerequisite to examination of the trial judge's process of decision, is the noticing in general outline of the elements which were before him at the conclusion of the case and after all of the evidence on both sides had been introduced:

(1) The trial judge knew in detail, on the basis of the Pre-Trial Stipulation of facts and the testimony of witnesses who saw it, the location, extent, nature and description of the physical damage to the bottom of Barge 4414;

(2) The trial judge likewise learned from appellee's witness, Jackson, the real agent, who, at the time of the damage, was foreman of one of the shifts on the land construction, that subsequent to the act of mooring and the departure of the "ROCONA", the barge was all right and resting normally and easily at her mooring and that approximately an hour and a half after the mooring (which Jackson did not observe and did not know exactly when it took place), the barge was observed to be listing and sporadically jettisoning her load of rock;

(3) The judge of the District Court further had before him the "personal opinion" [pp. 26, 31] of Mr. Jackson, who is obviously not qualified to express an opinion upon the subject, that the damage to the barge was caused by her being "pulled over the mooring float" [p. 60]. This, in comparison to Finding V [p. 23], to the effect that the barge *drifted* over the float;

(4) Finally, the trial judge heard the opinion of the sole qualified marine man, but an opinion only in negative form, *i. e.*, the overriding *was not caused* by the "ordinary and usual conditions of the current and tide and surge in the harbor" [p. 109].

There is no necessity here further to analyze the evidence of those in the best position to know positively and directly how the mooring was accomplished. That has been done in subdivision A(2) of this Section IV (ARGUMENT OF THE CASE).

The gist of appellants' thesis here is that the trial court built its conclusion of what is supposed to have happened upon a group of unproven presumptions—one placed upon

another. True, the *modus ratiocinari* of “presumption upon presumption” is not universally condemned by all courts when the rule is stated in that general form. However, in dialectics as well as in physics the chain is never stronger than its weakest link; and no court that we know of has approved the basing of a presumption upon a presumption, when the prior presumption upon which the conclusion depends has not been proved and clearly established. A fact in the nature of an inference may, upon occasion, be taken as the basis of a new inference, *provided*, the first inference has the required basis of a proved fact. Until chances of error are eliminated in an inference, it forms an unsound foundation for a second inference. Since such evidence consists in reasoning from known and proven facts to establish such as are conjectured to exist, the process is “fatally vicious” if the circumstances from which we seek to deduce the conclusion depend *also* on conjecture and speculation: Cite: *Jones “Commentaries on Evidence,”* 2nd Ed., Section 11, Vol. I, page 22. Professor Jones also states in the above work (pp. 74-77), that often pure factual inferences are based on circumstantial evidence and are drawn from all of the proof—those are frequently called “presumptions of fact.” However, they are not *rules of law* but are really only in the nature of argument, which therefore becomes weak when compared with direct evidence which is reasonable and not discredited.

We submit that no lengthy illustration of the applicability of the foregoing to this controversy is called for. Nevertheless, we might merely point out that even if proven (which was definitely not done), that the damage to the barge occurred during the time when the RoCONA was in charge of her, that in itself would be no basis at

all for presumption or inference that the RoCONA was negligent or in any way *caused* the damage. It is clear from previous argument (and the rule is indisputable), that no inference or presumption of fault whatever may be drawn from the *mere fact* of the *occurrence* of injury. Neither does any possible conception of the duties of proof resting upon appellants demand the discernment or demonstration of the actual cause of the holing of the barge by the U-bolt on the float.

The trier of the fact, while admittedly entitled to certain latitude in weighing the proven facts and circumstances, is nevertheless bound both in reason and in law to find some justification and reasonable certainty in the evidence to support its chain of reasoning. "Hunches" and ill-defined "feelings" engendered by a review of the evidence, do not furnish valid support for an uncontrolled and undirected flight of "reasoning" and "deduction" such as is supposed to have taken place in this suit.

Jackson's *opinion* is worth nothing. Even he characterized it as his "personal opinion" (pp. 56, 60), thus unconsciously indicating that even he himself did not value it too highly. Scheibe's opinion was restricted and negative in nature and did no more than *exclude* the effect of the ordinary and usual conditions of the current and tide and surge in the harbor from the causal field. The type, location and character of the physical damage bears no relation whatever, inferential or otherwise, to the "how" or the "when" of the barge coming on top of the float.

One may not justly presume (or infer) that Barge 4414 was in charge of the RoCONA when damaged and at the same time further presume (or infer) that the damage occurred by virtue of a "towing over" or permitting

the barge to drift over. The language in *The Albany*, 81 Fed. 966, 968-969 (C. C. A. 2), which case is still good law, and is still frequently used, might well have been written for this case. The case concerned a collision between ferry boats. The question for decision was placing the fault upon one or the other of the vessels involved, or apportioning such fault. The District Court held both vessels at fault. Only the libelants appealed. The Circuit Court reversed the District Court, with directions to decree damages against the respondent vessel alone. On the question of consideration on appeal of conflicting evidence, the Circuit Court said:

“When the district court has rejected the positive testimony of witnesses who were in the best position to know exactly what the truth was as to some disputed fact, and has accepted the testimony of others whose opportunity to know the truth was manifestly not as good, and does this on the expressed ground that the testimony rejected does not harmonize with some theory as to the movements of the vessels or with the inherent probabilities of the case, there is no reason why the appellate court should not review the testimony unembarrassed by the finding as to such fact. The ‘personal equation’ of the witnesses is of no assistance in determining what are or are not the probabilities of the case.” . . .

“Such a finding as to the *Susquehanna’s* navigation is a finding that her pilot and wheelsman testified falsely when they must have known the truth. We have most carefully examined the testimony of these two witnesses. It is clear and apparently straightforward, both on direct and cross-examination, and presents no inconsistencies. We do not find that it conflicts with the proof as to the place of collision, or the course of the *Hamburg*.”

The foregoing was a case of so-called "inherent probabilities" conflicting with the testimony of satisfactory and candid witnesses who were not impeached upon cross-examination. The Circuit Court held that the failure of the rejected testimony to harmonize with a theory or with inherent probabilities of the case, was no reason why the Circuit Court could not review the testimony unembarrassed by the findings below and reach a contrary conclusion.

In *Globe Accident Insurance Co. v. Gerisch*, 163 Ill. 625, 45 N. E. 563, 565, the court disapproved the basing of one presumption upon another in a train of circumstances basically similar in nature to those found in the record of trial of the instant cause. It was a suit upon an accident policy resulting in a plaintiff's judgment entered immediately after defendant's demurrer to the evidence was overruled. The Supreme Court of Illinois reversed the judgment upon appeal. Deceased was in the habit of carrying out ashes every evening and on the evening of the abdominal and intestinal injury from which he died he was seen shoveling ashes into a wooden box in which he usually carried them out. The ashes were shown to have been carried out that evening, but no one saw deceased lift the box and carry them out. Physicians testified that in their opinion, the intense intestinal inflammation was superinduced by some strain or external violence. The court held that the presumption that the deceased lifted the box of ashes could not be indulged in favor of the *further* presumption that death ensued from the injury thereby sustained. "For", said the court, "there is no open and visible connection between the facts out of which the first presumption arises and the fact sought to be established by the dependent presumption," citing

among other cases, *U. S. v. Ross*, 92 U. S. 281, 23 L. Ed. 707.

The court in the *Globe Accident Insurance Co.* case, above, refused to find that the missing link was established by presuming that Gerisch lifted the box and then further presuming that such was the cause of his internal injury. Similarly, "there is no open and visible connection," in our case between the towing of the barge, mooring her and the subsequently discovered hole in the bottom. The *time* of the damage is one of the great unknowns in this appeal. Just because the Rocona took the barge to the float and moored her and then, at least an hour and a half later, damage was discovered, requires pure and unadulterated speculation and conjecture if one goes further and supposedly "infers" that the tug negligently towed the barge over the float or permitted her to drift over it.

In *U. S. v. Ross*, 92 U. S. 281, 23 L. Ed. 707, claim was made upon the United States Treasury for funds derived from captured or abandoned cotton. The U. S. Supreme Court reversed the Court of Claims because it was not shown to have been a fact that the identical captured cotton from the plaintiff ever came into the hands of a U. S. Treasury Agent or that it was sold and the proceeds covered into the Treasury. The presumption that the plaintiff's cotton was a part of that proven to have been transmitted and sold, was held to have been unwarranted. Mr. Justice Strong speaking for a unanimous court said, in part:

"There must be evidence connecting the receipt of it (the cotton) by the Treasury Agent with the payment of the proceeds of sale of that identical property into the Treasury."

In consonance with the views of the United States Supreme Court above, and further shown in the *White City* case shortly to be cited, there must be *evidence* and not guessing to connect the damage to the act of mooring—not an unwarranted attempt to infer fault and all that goes with it from mere evidence of control by the tug at a time at least an hour and a half before the damage was discovered.

We respectfully urge this Honorable Court to read the opinion by Judge Learned Hand in reversing the District Court in the *White City*, 48 F. (2d) 557 (C. C. A. 2), 285 U. S. 195, 76 L. Ed. 699, and also the opinion of Mr. Justice Butler speaking for a unanimous United States Supreme Court in affirmance of the Circuit Court's decree of reversal. The facts and the contentions in the *White City*, above, are strikingly parallel to those in this appeal. The claimants did not prove when or how the accident happened or anything except the course taken, etc.; and that in the morning the craft was in the same condition as when the tower took over and that upon arrival after the towing the planking on the starboard side was broken. Claimants attempted to rely upon presumption of negligence from the mere fact of redelivery of the yacht in damaged condition. Both the Circuit Court and the United States Supreme Court held that the testimony was "too scanty" to support the presumption and to extend it to requiring explanation of how the injury occurred or that it was not caused by the tower's neglect. Just as in the incident case great reliance was placed upon the towage contract, but it was unequivocally held in both the Circuit and the United States Supreme Courts that the yacht was not in bail to the tug and that no presumption of fault arose from the happening of the damage. The ultimate

burden perpetually rested upon the claimants to show that the loss was caused by breach of the tower's duty.

Per Mr. Justice Butler (p. 704 of 76 L. Ed.):

“The burden of proof as to respondent's negligence remained upon petitioner throughout the trial. His contentions clearly show that the evidence leaves the time, place and cause of the injury in the realm of conjecture. The evidence is consistent with an hypothesis that the tug was not negligent and with one that it was, and therefore has no tendency to establish either.”

Another case was referred to in the *White City* case in which the contention was advanced that the claimants were in an inconvenient and complicated situation because, to establish the allegations of the libel, it was necessary to resort to those navigating the tugs and to the evidence given by interested witnesses anxious to exonerate the vessel to which they were attached. Mr. Justice Butler quoted from that case: “We are not aware, however, of any ground on which such inconvenience can affect the rule of law which governs the rights of the parties.” Though justified by the importance and application of the *White City* case, we do not wish further to extend the volume of this brief by lengthy quotations from the opinions in both of the upper courts.

1. *Res ipsa loquitur* is not applicable because:

(a) Appellants were not shown to have had exclusive control of the “instrumentality” at time of injury.

(b) The facts do not warrant an inference of negligence on the part of appellants.

The prime reason why *res ipsa loquitur* cannot avail to supply deficiencies in appellee's proof is stated in (a) above. Our prior argument under this subdivision C of the ARGUMENT OF THE CASE on the subject of presumptions based upon other presumptions and unwarranted inferences and deductions, is likewise applicable at this point because: To establish the first essential element of the applicability of *res ipsa loquitur* it would require this court to presume, first, that the damage occurred while the ROCONA was still at the scene or that such damage proximately resulted from an act or omission on the part of the ROCONA while at the scene and, *further*, that there was a direct causal connection between some act or omission on the part of the tug and the occurrence of the damage.

As Professor Shain, in his work, "*Res Ipsa Loquitur*" (1945), so clearly points out on page 5 of his work, the plaintiff must always and at the outset prove:

(a) The "thing" is part of a causal chain connecting injury to the plaintiff to the act or omission of the defendant, AND

(b) The "thing" is within the exclusive control of the defendant, AND

(c) The "thing" does not ordinarily occur if the one having exclusive control of it uses proper care in exercising that control.

In his footnote on page 10, Professor Shain points out that it is of the essence of the doctrine that the court takes judicial notice of (c), above, only AFTER the plaintiff has *first* proved (a) and (b) above.

There is no evidence whatever in the record before this court that the damage occurred at the time of mooring nor that it resulted directly and proximately from an act or omission at the time of mooring. In the case at bar, the finding in favor of appellee inherently includes a conclusive presumption, before the appellants spoke through their evidence, that not only was the Rocona negligent in the mooring but *also* that the injury occurred directly and proximately from some act committed or omitted *before* the Rocona released control of the barge to the mooring facility furnished and maintained by appellee.

It may be denied that *res ipsa loquitur* was applied in this case by the trial court. But see the Court's remarks on pages 208-209 and 211. We can find no escape from the conclusion that the doctrine was, in fact, applied at least subconsciously in the mind of the court. Appellee gave no evidence of negligence on the part of anyone. It merely proved the towage engagement, the place and the character of the damage. Appellee's evidence does not constitute evidence of negligence *per se*, it is merely proof of circumstances from which appellee prayed the court to infer (*i. e.*, presume), negligence on the part of appellants.

At this point in the examination of whether the doctrine of *res ipsa loquitur* is applicable to the case, we call attention to the very recent decision of the California District Court of Appeals for the First District: *Larson v. St. Francis Hotel*, 83 Adv. Cal. App. 266, 188 P. (2d) 513. Although a State case, the application of the doctrine to the facts is nonetheless orthodox and in conformity

with the universal view. Plaintiff was non-suited at the conclusion of her case in chief, and the judgment of non-suit was affirmed on appeal. On V-J day during the celebration in San Francisco she stepped from under the marquee extending over the sidewalk in front of the St. Francis Hotel and was struck on the head by a heavy, upholstered chair. No evidence identified the source from whence the chair came, but faithful to the rules requiring all favorable inferences to be indulged in favor of a non-suited plaintiff, the court assumed that it came from the hotel. Application of *res ipsa loquitur* was disapproved because exclusive control of the instrumentality (the chair) by the defendant hotel, either actual or potential, was not shown. The court mentioned that guests have at least partial control. The California District Court of Appeal adhered to the same rule which we have previously mentioned on a couple of occasions, viz: when it appears that the injury was caused by one of two causes, for one of which defendant is responsible, but not for the other, the plaintiff must fail if the evidence fails to establish that the injury was the result of the former cause, or leaves it as probable that it was caused by one or the other.

The real burden of proof always rests upon the plaintiff and the effect of applying *res ipsa loquitur* is merely to say to the defendant: "It is your move to explain and rebut." When the scales are at even balance the finding must be against fault. Up to the time that the defendant puts in evidence, all that the court has under the doctrine

of *res ipsa loquitur*, is an hypothesis based upon circumstances. Hence, the proper conception of the application of the doctrine in net effect is merely, at the proper stage of the proceedings, to shift the burden of persuasion.

In all *res ipsa loquitur* cases the *cause of the accident* must be first clearly connected with the defendant as being by his act or under his control before a court may thereafter properly indulge in the presumption of negligence (Jones "Commentaries on Evidence," 2nd Edition, page 138). Professor Jones further says at page 139 of his work: "*Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense." That is to say, properly considered, the doctrine only means that—with all other evidence in the case—there is some basis furnished from which the trier of the fact may infer the ultimate fact of negligence. A plaintiff's verdict may be *warranted* by the doctrine but it is never *compelled* by the rule. At page 139 Professor Jones deprecates the use of the word "presumption" as unfortunate. He demonstrates that *res ipsa loquitur* is nothing more than a label for the principle that in certain cases a court may, *from proven facts*, infer the ultimate fact of negligence.

The inherent vice in the reasoning process of the trial court, we respectfully submit, is that by employing the process of reasoning by exclusion, the learned trial judge did not (and, of course, he could not) cover all causes which due care on the part of the appellants might have prevented.

We are not unaware of two cases in the United States Supreme Court, the second of which arose in the Ninth Circuit, and both of which bear upon the doctrine of *res ipsa loquitur*, viz: *Jesionowski v. Boston & Maine Ry. Co.*, 329 U. S. 452, 91 L. Ed. 416; and *Johnson v. The United States of America*, 92 L. Ed. (Adv. Op.) 360 (decided February 9, 1948, official citation unavailable). However, neither of those cases is at variance with the principles contended for above and the facts are certainly of no assistance whatever. Should appellee choose to rely upon either or both of such cases in its reply we shall then, of course, be afforded the opportunity to offer further comment in appellants' closing brief.

Wholly aside from any and all of the considerations treated thus far on the subject of *res ipsa loquitur*, and sufficient in itself completely to foreclose the application of the rule, is the showing through appellee's witness, Raimer, that though not physically present he was, nevertheless, clothed with both responsibility and power of control of the mooring and the hauling of rock during material times here in question. He was on 24 hour duty, and subject to call [p. 84]. He was responsible for the tows until they were made fast, and if an accident happened in towing, or part of a load was lost due to a marine accident, it was up to him "to come up with the answers as to what happened" [p. 90]. Further elaboration of his position in that regard occurs on pages 91, 92, 95-96 of the record. It is wholly immaterial whether Mr. Raimer actually exercised his control and powers of di-

rection in this instance or whether he was actually present, so long as he was charged with the duty and clothed with the authority, which he so clearly and minutely demonstrated by his testimony, both upon his direct and his cross-examinations.

Hence, we repeat that Mr. Raimer's position alone would put any consideration of the doctrine of *res ipsa loquitur* wholly out of the case and destroys that essential element of exclusive control of the supposed instrumentality.

Conclusion.

Appellants respectfully submit that as careful as the District Judge was to reach a just conclusion, he was unwittingly led astray by his unfamiliarity with maritime matters and maritime cases,¹ and by his expressed feeling, aided by counsel's statement immediately thereafter, that possibly the *highest* degree of care is the measure of responsibility [p. 209].

We have shown that the record is wholly devoid of any acceptable opinion evidence in support of the findings and decree and, further, that the findings and decree are entirely at variance with the direct, reasonable and unimpeachable evidence of the due performance of duty by appellants. The District Court's sincere attempt to ration-

¹The Court: "I have a great deal of difficulty in expressing what I have in mind in regard to trying to use these terms, because I do not have enough of these cases to be very familiar with them." (Page 125.)

alize, to deduce and to reason by exclusion from the physical facts, etc., under the evidence in the record, rises to no higher dignity than that of guessing, speculation and conjecture. If the case was to be decided upon pure speculation, it is submitted that a finding of contributory fault on the part of appellee in the form of furnishing a mooring facility, probably waterlogged and anchored on too short a chain, would have been more justifiable than the present findings of sole fault on the part of appellants.

It is respectfully submitted that the Interlocutory Decree and Order of Reference entered below should be reversed, with directions to dismiss the libel.

HILL, MORGAN & FARRER,

By WILLIAM S. SCULLY,

Proctors for Appellants.

No. 11885.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

The Tug ROCONA, her engine, tackle, apparel and furniture, JOHNSON WESTERN COMPANY, a corporation, and CASE CONNOLLY COMPANY, a corporation,

Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,

Appellee.

BRIEF FOR APPELLEE.

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JUN 19 1948



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No. 11885.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

The Tug ROCONA, her engine, tackle, apparel and furniture, JOHNSON WESTERN COMPANY, a corporation, and CASE CONNOLLY COMPANY, a corporation,

Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,

Appellee.

BRIEF FOR APPELLEE.

This appeal is from an Interlocutory Decree and Order of Reference which adjudged Appellants in sole fault for damage caused to Appellee's BARGE No. 4414 when it was moored by Appellants' Tug ROCONA to Appellee's mooring float.

Statement of Facts.

On March 31, 1945, BARGE No. 4414, loaded with rock was towed by the Tug ROCONA from Catalina Island to appellee's mole construction job at Los Angeles Harbor.

BARGE No. 4414 is about 120 feet long with a 40-foot beam. Loaded, it had a gross weight of 1200 tons, a freeboard at the bow of 3 feet and draft of 9 feet. The

freeboard at the stern was about 18 inches. The barge has a "rake" bow extending diagonally downward and backward to flat bottom. At each corner there is a "bitt" or "Samson post." The bottom planking is 12 inches wide by 4 inches thick. The bottom planks are described by number commencing at the bow end of the flat bottom. (Thus plank number 22 is twenty-two feet from the bottom of the rake.)

The float to which the barge was to be moored is a solid wooden block ten feet square by four feet thick, anchored in the harbor near the mole. To the top surface of the float is fastened a large "eye" or "U bolt," made of 2-inch diameter steel. It extended upward about 12 inches from the "deck" of the float. A steel cable or "mooring pendant," about 40 feet long, was attached to the "U bolt." An "eye" or loop was spliced in the free end of the mooring cable so that when the barges were moored the eye could be slipped over the barge's Samson post and the towing bridles cast off. An anchor chain or cable, about 75 feet long led to a similar "U bolt" in the under side of the float.

When BARGE No. 4414 and BARGE No. 4412 were delivered to the RoCONA no employee of appellee was aboard either barge or tug. They were towed tandem from Catalina Island to the east entrance of the breakwater where they arrived at 11:30 p. m. At 11:40 p. m. the tug and tows cleared the anti-submarine net gate. At 12:10 a. m. the first barge, BARGE No. 4412, was turned over to the tug DISPATCH, the towline to BARGE No. 4414

was shortened, the tug's deckhand, equipped with a flashlight and pike pole, was put aboard the tug, and the ROCONA proceeded toward the mooring float. The tug captain saw the mooring float at about 1000 to 1200 feet as he turned his spotlight on it. When the barge was from 100 to 200 feet from the float the tug captain shut off his power and by maneuvering the barge, caused its forward momentum to bring it toward the float so that the deckhand standing at the starboard forward corner of the barge could reach down with his pike pole and pick up the mooring cable. At no time did the tug "back down against" the barge to stop its forward motion. The deckhand slipped the mooring pendant on the Sampson post, cast off the towing bridle and reboarded the tug. They made a "circle" of the barge and seeing nothing wrong, returned to their berth.

Jackson, appellee's night superintendent (from 12:00 to 4:00 a. m.), shortly after the barge was moored, made his rounds in a speedboat to see that the several barges were in apparent good order. At that time he noticed nothing unusual. An hour or an hour and a half later, when he next made his rounds, he discovered BARGE No. 4414 listing "quite badly" and dumping her load of rock. It was explained that free water in a barge of this type will run to one side and cause the barge to list until part of the load is lost, when the barge will right herself and the water will run to the other side, the process being repeated until the barge sinks or capsizes. Appellee's employees attempted to prevent the barge from sinking

with her load of rock by calling for another tug, but the bulk of the rock cargo was lost.

The following day BARGE No. 4414 was capsized and it was discovered that a hole the size and shape of the mooring float's "U bolt" had been punched through the barge's four-inch bottom planking. The leak from a hole this size would cause the barge to begin to list in a half hour to an hour. The hole was about five feet inboard from the starboard side and through planks numbered 22 and 23. In plank numbered 21 adjacent to the hole there was a gouge about 2 inches wide and a half inch to an inch deep. This "gouge" or "groove" was the after portion of a deepening scratch extending diagonally forward from the hole for about seven or eight feet. The distance from the hole to the starboard forward Sampson post, measured around the rake equalled the length of the mooring pendant.

At all times involved the wind was negligible and ordinary harbor currents and surges were present. At 11:30 p. m. the tide was at a height of 4.91 feet; by interpolation at 12:10 a. m. it was at 4.42 feet; at 12:45 at 4.1 feet.

Appellee seeks in this action to recover its damages to the barge and cargo alleging that the damage was caused by negligence of appellants' crew in mooring the barge. The District Court, by its interlocutory decree, found appellants negligent and in sole fault. This conclusion was reached by the Court after weighing the inferences to be drawn from circumstantial evidence of negligence,

and the inference of negligence from application of the *res ipsa loquitur* doctrine against the inferences of no fault that appellants urged should be drawn from the testimony of their tug's crew.

Questions Involved.

Appellee believes that the sole question involved in this appeal is:

Was the District Court correct in finding that appellants' tug crew negligently caused appellee's damage?

Appellee urges:

(1) that appellants were proved to be negligent by:

(a) direct evidence of negligence;

(b) the appropriate inference of negligence arising from application of the doctrine of *res ipsa loquitur*; and,

(2) That appellants' negligence was the sole and proximate cause of appellee's damage and loss.

Summary of Argument.

This Court has on many occasions indicated that it will not disturb a finding by the District Court which is supported by evidence and not clearly erroneous.

In this case, the facts and circumstances, viewed objectively, indicate that appellee's barge was caused to run over a mooring float by negligence of appellants' crew. Appellants' crew testified that they had moored the barge properly, and without incident. The District Court found that the "physical facts spoke louder than the words of the witnesses" and (basing its decision on circumstantial evidence of negligence as well as the inference from application of the doctrine of *res ipsa loquitur*) found appellants negligent and in sole fault. Appellee urges that this finding is not only based upon substantial evidence, but also is the most reasonable inference to be drawn from all the evidence.

The "thumbprint" of the mooring float, a hole the size and shape of the "U" bolt of the float (either the top eye to which the mooring cable was attached or the similar bottom eye to which the anchor chain was affixed) a distance from the Sampson post, measured around the rake of the barge, just equal to the length of the mooring cable, was found punched through the bottom planking. A deepening scratch, some seven or eight feet long, extending forward from the hole indicated that the barge was stopped by allowing it to come up sharply to the scope of the mooring cable and anchor chain. The barge was inspected by appellee's night Superintendent as he made his rounds by speedboat, shortly after the tug had left. It was then in *apparent* good order. A leak from a hole of

this size would cause the barge to *begin* to list in one-half hour to one hour. When next the Superintendent made his rounds, an hour to an hour and a half later, the barge was listing badly, and dumping her load of rock.

Appellants' witnesses indicated that the barge was brought toward the float at a speed of one knot or less until it was within 100 to 200 feet of the float when the power was shut off, and that tug maneuvered the barge so that the starboard forward corner of the barge approached the float. The distance traveled and the time element would indicate a somewhat greater speed.

The physical facts point to the conclusion that the tug towed the barge toward the float at a speed sufficient to cause the barge to overrun the float and that the tug's crew allowed the barge's forward way to be stopped by the mooring cable and the anchor chain of the float. No effort was made to back the tug into the barge, although the tug could readily have checked the momentum of this 1200 ton barge in this manner.

The District Court's interlocutory decree was based on evidence of negligence from the physical facts presented and the application of the doctrine of *res ipsa loquitur*. The circumstances of this case are such that a reasonable inference of negligence of the tug's crew arises. Barges, carefully and properly moored, are not holed by "U bolts" from mooring floats. The trier of fact found that appellants did not rebut this inference and that appellee met its primary burden of proof.

This finding appellee submits is not only supported by substantial evidence but is the logical conclusion to be drawn from consideration of the entire case.

ARGUMENT.

I.

The District Court's Decree Is Supported by the Strongest Presumption of Correctness.

Although an appeal in Admiralty has been traditionally described as a trial *de novo*, the decree of the District Court is presumed to be correct.

Heder v. U. S. (C. C. A. 9th, 1948), 167 F. (2d) 179, No. 11767 (Decided 5/5/48); 1448 AMC 12

Bornhurst v. U. S. (C. C. A. 9th, 1947), 164 F. (2d) 789, 1948 A. M. C. 53 (Cert den. U. S., L. Ed. (Adv.), 68 S. Ct. 789);

Stetson v. U. S. (C. C. A. 9th, 1946), 155 F. (2d) 359, 1946 A. M. C. 900;

Meintsma v. U. S. (C. C. A. 9th, 1947), 164 F. (2d) 976 1948 A. M. C. 144.

Where the evidence is partly oral and partly by deposition, the presumption of correctness is strong, but the Appellate Court will give such weight to the findings of the trial court as judicial discretion dictates.

Tarvada v. U. S. (C. C. A. 9th, 1947), 162 F. (2d) 615, 1947 A. M. C. 947;

Matson Nav. Co. v. Pope & Talbot (C. C. A. 9th, 1945), 149 F. (2d) 295, 1945 A. M. C. 767 (cert. den 326 U. S. 737, 90 L. Ed. 439, 66 S. Ct. 46);

U. S. v. Lubinski (C. C. A. 9th, 1946), 153 F. (2d) 1013, 1946 A. M. C. 483;

Pac-American Fisheries v. Hoof (C. C. A. 9th, 1923), 291 Fed. 306, 1923 A. M. C. 1180;

The Diamond Cement (C. C. A. 9th, 1938), 95 F. (2d) 738, 1938 A. M. C. 757.

When the testimony is entirely by deposition the case does not come to this Court “encased in its usual armor.”

Johnson v. U. S. (C. C. A. 9th, 1947), 160 F. (2d) 789, 1947 A. M. C. 765. (Reversed on other grounds.....U. S., 92 L. Ed. (Adv.) 360, 68 S. Ct. 391);

Ernest H. Meyer (C. C. A. 9th, 1936), 84 F. (2d) 496, 1936 A. M. C. 1179, (cert den. 299 U. S. 600, 81 L. Ed. 442, 57 S. Ct. 193);

The Indien (C. C. A. 9th, 1934), 71 F. (2d) 752, 1934 A. M. C. 1050.

But when, as in this case, the trial court has the benefit of oral testimony in open court, and the advantage of direct contact with the witnesses, the strongest of presumptions should and does apply. Under these circumstances this Court has many times stated emphatically that findings supported by substantial evidence not clearly erroneous, should not be disturbed.

Heder v. U. S. (C. C. A. 9th, 1948), 167 F. (2d) 899 No. 11767 (decided 5/5/48) (*supra*);

Bornhurst v. U. S. (C. C. A. 9th, 1947), 164 F. (2d) 789, 1948 A. M. C. 53 (cert den..... U. S.,L. Ed., 68 S. Ct. 789) (*supra*);

Stetson v. U. S. (C. C. A. 9th, 1946), 155 F. (2d) 359, 1946 A. M. C. 900 (*supra*);

Meintsma v. U. S. (C. C. A. 9th, 1947), 164 F. (2d) 976, 1948 A. M. C. 144 (*supra*);

Tawada v. U. S. (C. C. A. 9th, 1947), 162 F. (2d) 615, 1947 A. M. C. 947 (*supra*).

Appellants have indicated that the credibility of the witnesses is not here primarily under investigation (Appellants' Opening Brief p. 31). With this we can not agree because there is a definite conflict between physical evidence indicating negligence of the appellants' tug crew and their testimony inconsistent with this conclusion. The District Judge simply did not believe them [A. 213] and found that their testimony was "not convincing and cannot be accepted" [Findings, A. 25]. We do not understand just how this oral testimony, which the trial court disbelieves, can be compared to testimony by deposition. (See Appellants' Opening Brief p. 31) Credibility of witnesses is primarily the business of the District Court and the Appellate Court normally does not concern itself with this feature unless clear error is shown.

Vileski v. Pacific Atl. S. S. Co. (C. C. A. 9th, 1947), 163 F. (2d) 553, 1947 A. M. C. 1707;

Wilson v. Interocean S. S. Corp. (C. C. A. 9th, 1947), 163 F. (2d) 459, 1947 A. M. C. 1666;

Portland Stevedoring Co. v. Wegener (C. C. A. 9th, 1947), 162 F. (2d) 830, 1947 A. M. C. 1070;

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The Mable (C. C. A. 9th, 1932), 61 F. (2d) 537, 1932 A. M. C. 1618;

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*Crozeley Launch and Tugboat Co. v. Wilmington
Transportation Co.* (C. C. A. 9th, 1941), 117
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Stockton Sand and Rock Co. v. Bundeson (C. C.
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659;

Drain v. Shipowners & Merchants Towboat Co.
(C. C. A. 9th, 1945), 149 F. (2d) 845, 1945
A. M. C. 892.

The second Circuit Court of Appeals, in the case of

*Petterson Lighterage and Towing Corp. v. New
York Central Railroad Co.* (C. C. A. (2d)
1942), 126 F. (2d) 992, 1942 A. M. C. 345,

has assembled a formidable appendix of authorities. The historical aspect of the “*trial de novo*” is discussed, as well as the “rubric,” of Rule 52A, *Federal Rules of Civil Procedure* (28 U.S.C.A., Sec. 723c, Rule 52A), and the effect of *Admiralty Rule 46½* (28 U.S.C.A., Sec. 723, Rule 46½).

II.

The District Court's Findings Are Not Only Supported by Substantial Evidence, But Also Are the Most Reasonable Inferences to Be Drawn From the Evidence.

A. Appellee Was Without Fault as to Loading and Trim of the Barge.

The District Court correctly found appellee to be without fault as to the manner, method or condition of loading the barge [Findings, A. 25. Conclusions of Law, A. 26]. Appellants in their answer tendered an issue of negligence as to the loading and trim of the barge when it was delivered to appellant at Catalina Island. This issue was apparently abandoned when appellants' tug captain, Reeves, testified that he had the duty not to take the barge in tow unless she was seaworthy [A. 138]. He was corroborated by witness Tomasic [A. 167]. The surveyor likewise regarded the barge as entirely seaworthy [Scheibe, A. 110, 111]. The barge had no difficulty making the channel crossing [Reeves, A. 138], nor could she have made the crossing with a hole this size in her bottom [Reeves, A. 144; Rainer, A. 99]. Were there any doubt on this score, the tug would not have accepted the tow.

B. Appellee Was Without Fault as to Maintenance of the Mooring Float.

The District Court found that appellee was without fault as to providing, furnishing or maintaining the mooring float or in any other respect [Findings, A. 25, Conclusions of Law, A. 26]. Appellants claimed that the presence of moss on the sides (not the top) of float [Gentle, A. 204] and greater "flotation" forty-eight hours after the accident [Gentle, A. 205; Tomasic, A.

160] indicated a "waterlogged" float or that the anchor chain was short. The tide had been at a flood of 4.91 feet at 11:30 p. m. and was at an ebb of .61 feet at 6:12 a. m. [stipulated fact, A. 89]. By interpolation, at 12:45 a. m., when the mooring was completed according to appellants' Log [Exhibit B; Tomasic, A. 166], the tide was at about 4.1 feet. The evidence is that the anchor chain was 75 feet long, [Jackson, A. 44] and that the water depth was about 28 feet [Jackson, A. 49] at low tide [Jackson, A. 61]: if 4 feet is added there would be about 32 feet of water. Mr. Scheibe's testimony is unchallenged that a 75 foot anchor cable is sufficient in water of this depth [A. 120]. A substantial portion of the mooring float must have been out of water to be visible to the tug master at 1,000 feet to 1,200 feet [Reeves, A. 141] and to the deckhand at about 750 to 1,000 feet [Tomasic, A. 172, 157]. The inference appellants draw that the float was low in the water, with one corner down [Tomasic, A. 160], because of a short anchor line is less probable than the inference appellee urges that the float was then being drawn under water by the slow forward motion of the barge as its momentum pushed the float ahead. This action would tend to lift the anchor chain from the bottom and place greater weight on the float. When the anchor chain became taut the float would be and was pulled below the rake of the barge. In no other way could a float, four feet thick be drawn below a barge whose draft was nine feet. It is to be noted that the next day [Gentle, A. 197] or 48 hours later [Gentle, A. 205] when Gentle saw the float, a bulkhead of 4 x 4's had been built around the U bolt in an effort to prevent repetition of this damage to any other barges towed over the float. If it is true that there was then greater "flotation" to

this same float, it could hardly have been "waterlogged." Even if it be granted, for the sake of argument, that the float was awash or nearly so [Tomasic, A. 160] we can see no material bearing this has on the case. The float was four feet thick, the barge had a nine foot draft. Under the circumstances as stipulated, it was impossible for the barge to have been forced on the float by ordinary conditions of wind and current [Scheibe, A. 109]. Perhaps the best evidence that the float was a proper mooring is the fact that appellants' crew moored the barge to it without hesitation. Surely appellants will not now seriously advance the theory that their crew were negligent in leaving the barge at an unsafe mooring without a word of protest or warning.

C. The Court Properly Found Appellants at Fault.

The District Court correctly found that appellants were negligent with respect to maneuvering the tug, approaching the float at an excessive speed, causing the barge to override the float and failing to stop the barge or to take measures to prevent the barge from overriding the float [Findings, A. 25; Conclusions of Law, A. 26].

**1. THE BARGE WAS TOWED AT EXCESSIVE SPEED AS IT
APPROACHED THE FLOAT.**

As to speed, the only direct testimony comes from the three crew members of the tug. They say three-fourths to one knot [Reeves, A. 139], one knot [Tomasic, A. 152, 155, 156] two knots before turning the barge over to the Dispatch and one knot thereafter [Tomasic, A. 168] one-half to three-fourths of a knot [Gentle, A. 195,

202]. The accuracy of these estimates, and of the estimates at the actual time of the mooring, can well be questioned. A considerable greater speed is indicated by the elapsed time shown in the Log [A. 166, Respondents Exhibit B], and the distance traveled. From 11:30 p. m. when the tow cleared the breakwater, east entrance, to clearing the net was ten minutes. At 12:10 a. m. the tow reached the point where the other barge was turned over to the tug DISPATCH. This was estimated at about two miles [Tomasic, A. 151] and took forty minutes, including the time at the gate [Tomasic, A. 168]. The average speed for this distance is at least three knots. From 12:10 a. m. to 12:45 a. m., thirty-five minutes, the ROCONA shortened line, towed the barge to the float and moored it. Fifteen minutes is required to develop sufficient air to operate the air winch [Gentle, A. 192]. Without considering any time for shortening the line from 540 feet [Gentle, A. 190] to about 60 feet [Gentle, A. 192] there remains about twenty minutes to go from G1 to G3 [Libelant's Exhibit 4] a distance estimated at about one mile [Gentle, A. 195]. This averages to a three-knot speed. Aside from these computations, we have direct evidence of too much speed from the scratch and hole, a distance from the Samson post equal to the length of the mooring cable. This shows that the barge approached the float with sufficient speed to overrun the float and still had sufficient momentum to come up sharply against the float and its anchor and with enough force to punch a hole through two 4-inch by 12-inch planks.

2. THE TUG WAS IMPROPERLY MANEUVERED INTO AND OVER THE FLOAT.

As to maneuvering the tug, Reeves states that he shut off power when he was 100 feet [Reeves, A. 132] or 100 to 150 feet from the float [Reeves, A. 142], and let the barge drift ahead. Tomasic indicates that the power was shut off when the barge was 200 feet from the float [Tomasic A. 157] although on cross-examination [A. 172] the estimate was reduced to between 100 to 200 feet. Gentle states that the tug “dropped tension at approximately 100, 150, 200 feet away with slight maneuvers to get her to head in the correct position” [Gentle, A. 196, 201] and that it would be unusual for the barge to run “directly in a direct line to the float,” without such supplementary maneuvering [Gentle, A. 202]. Although there are several references to the barge being “dead in the water,” the barge had way and was moving into the float, pushing it along ahead of the barge. The expression “dead in the water” included forward motion of the barge [Tomasic, A. 174]. Tomasic admitted that the barge was “almost at a dead stop” [A. 172] and Gentle stated that it was customary to approach a mooring float at “almost a dead stop with only just slight way on” [A. 203].

It is understandable that at night it might well be difficult to distinguish between moving slowly and a complete absence of forward motion in the water. A tug captain always approaches the float upwind [Tomasic, A. 177]. Although the wind was negligible and the ordinary currents existed [Pretrial Stipulation, A. 18; Tomasic, A. 156], in all probability the float would be resting to the down wind or down current side of the anchor to which it was affixed by a 75-foot chain or metal cable [Jackson, A. 43, 44]. The float would then be some fifty or sixty

feet from the anchor. The barge could readily push the float ahead of it, into the area upwind of the anchor, a distance of some sixty-five to seventy feet from the anchor before the anchor chain would be drawn taut, and the float actually pulled under water. During the time the barge moved slowly over this distance of from 115 to 130 feet, it is understandable that the tug's crew might well not realize that they were moving as the gross tonnage of 1,200 tons was slowly decelerating. No effort was made by the tug to "back down against" the barge, [Reeves, A. 134]. If the average rate of speed during the deceleration period was one-half knot, or fifty feet per minute, it would take approximately two and a half minutes from the time the rake of the barge reached the float until the scope of the anchor chain was reached. Another minute or so would be required for the barge to reach the end of the mooring cable. Reeves states that the entire operation of mooring took approximately five to ten minutes [Reeves, A. 136] including presumably the elapsed time from the point where power was shut off, as the barge approached the float, until the time the tug made a circle of the barge and started for Berth 94 [Reeves, A. 135]. Tomasic stated that it took him 5 to 10 minutes [A. 159] to raise the wire. These estimates of time do not purport to be exact. It could equally have been two or three minutes or less. Part of Tomasic's "difficulty" was undoubtedly due to the fact that the float was being pushed ahead of the barge for several minutes before it was drawn under water.

If the barge pushed the float slowly through the water from one side of the anchor to the other, it is understandable that one side or corner would go under water. The float as it neared the end of the anchor chain would ride

lower in the water as the entire scope of the anchor chain was drawn from the bottom and the float was called upon to support a greater weight. When the anchor chain was drawn taut, the far end of the float would naturally be drawn under water first. Tomasic recalls that one of the corners was under water [Tomasic, A. 160] but is not sure whether it was at the near or the far side [A. 181]. It is conceded that no steps were taken to stop the barge. Reeves states that if he desired to “back down against” the barge he would have rung two bells [Reeves, A. 146] and he “could have backed the barge clean away from the mooring float,” but that he did not do so [Reeves, A. 134]. The same implication appears from Tomasic’s testimony [A. 163]. It is unlikely that these men, who were working on a salary [Tomasic, A. 183], would be over-anxious to spend more than a bare minimum of time after midnight, Saturday night, stopping a barge which they had brought up too fast. The attitude shown in the testimony of Tomasic [A. 186, 187] that pulling a barge over the float was not “unusual” and “it happens” is entirely consistent with letting the barge stop herself against the mooring float anchor, despite the danger of damage [Tomasic, A. 176, 177].

There are several references to the likelihood of damaging the barge. Jackson [A. 54] indicates that, if the barge comes in with too much momentum, the pendant can be broken or the mooring float can be pulled under the barge and a hole punched in the bottom when the barge “comes up with a jerk” against the mooring or it can override the mooring or “pass over the top of the float.” Tomasic appreciated that there was danger of breaking the anchor chain or the Samson post [A. 177]. He also indicated [A. 174] that a barge described as “dead” al-

ways has some motion and that he himself made the decision as to whether to drop the mooring cable or to put it on the bitt when the master brought in a barge too fast.

D. The Damage Was Caused When and Because the Barge Was Towed Over the Float. There Is No Other Reasonable Explanation.

The District Court's finding that the Rocona caused the barge to override the float and failed to take measures to keep the barge from overriding the float is amply supported by the evidence. Under ordinary conditions of surge and current, with a negligible wind [see Pretrial Stipulation, A. 18], it was impossible for the barge to have overridden the float unless some outside force was applied to it [Jackson, A. 55; Scheibe, A. 109, 111, 112]. Tomasic testified flatly that the tug did not pull the barge over the float [A. 162]. Reeves was considerably less positive [A. 134]. Gentle would not commit himself [A. 197].

Jackson estimated that he first saw the barge from the speedboat at about 12:30 a. m. and within an hour or hour and a half she was discovered to be listing "quite badly" [Jackson, A. 49, 50], because of a leak through a hole the approximate dimensions of the "U bolt" of the float [Pretrial Stipulation, A. 18, 19; Jackson, A. 51; Bach, A. 82; Raimer, A. 87; Scheibe, A. 106]. The surveyor states that the barge would *begin* to list a half hour to an hour after being so damaged [Scheibe, A. 110]. A scratch, some seven or eight feet long [Scheibe, A. 106; Bach, A. 78] extended forward from the hole. The after portion of the scratch was deeper and wider than the forward portion. At the hole it was about 2 inches wide and one-half to one inch deep [Scheibe, A. 107; Bach, A. 78].

The hole was about the same distance from the Samson post, 40 to 50 feet [Bach, A. 79], measured around the rake of the barge [Jackson, A. 44], as the length of the mooring cable. Tomasic estimated that the cable was shorter than usual, 35 to 40 feet [Tomasic, A. 159], but on cross-examination indicated that the cable was 40 feet in length [Tomasic, A. 179]. If the cable appeared shorter, it would not be inconsistent with the thought that the mooring float had already been drawn partially under the barge when he reached the end of the cable and slipped the eye over the Samson post. Jackson states definitely that in his opinion the barge overran the mooring float and "when the mooring pendant came up (*i. e.* when the barge reached the end of the mooring pendant and the anchor chain) it turned the barge (mooring float) up, the U bolt punched a hole in it" [Jackson, A. 56]. The surveyor states that in his opinion the barge overrode the mooring float and that "the eye—the 'U' bolt punctured the bottom planking" [Scheibe, A. 107]. The bottom planking was four inches thick by 12 inches wide [Bach, A. 77; Scheibe, A. 106]. Punching a hole through this sturdy construction must have required application of considerable force, such as the momentum of 1200 tons [Ramier, A. 95] moving slowly and irresistibly into and over the float. This considerable weight was not halted until it pulled the mooring cable and anchor chain taut. The deepening scratch is consistent with the barge still having substantial way when it reached the end of the mooring cable. The District Court decided that these

physical facts spoke louder than the words of the witnesses [Oral Decision, A. 213].

The language in the Second Circuit case of

F. E. Grauweiler Trans. Co. v. Gallagher Bros. Sand & Gravel Co. (C. C. A. (2d) 1946), 153 F. (2d) 384, 1946 A. M. C. 221.

is particularly appropriate:

“Granting that the scow struck a mooring block, there can be no real question but that it was due to the negligence of the tug.”

III.

The Trial Court Correctly Applied the Doctrine of Res Ipsa Loquitur in Concluding That Appellants Were Negligent.

The barge was in the exclusive control of appellants. The tug was operated and manned by appellants' employees. No employee of appellee was on the barge or tug [Pretrial Stipulation, A. 17; Raimer, A. 101]. Appellants' suggestion that Raimer who was at home [Raimer, A. 84], probably in bed, when the barge was damaged, had general supervision over the barges, and therefore appellants did not have “exclusive control” of the barge, is hardly a realistic approach. The search is for the negligent party in this type of case. The question asked is, “Who had the opportunity to be negligent under these circumstances?” We can readily eliminate Raimer. We can also eliminate the action of the tides and currents, because it was not only improbable but *impossible* for the barge to have overridden the float without outside force or motive power being applied [Scheibe, A. 109; Jackson,

A. 55] under ordinary conditions of wind current, tide and surge. At the time of the accident the wind was negligible and the ordinary currents and surges were present [Pretrial Stipulation, A. 18; Jackson, A. 71, 72]. Examination of the time element requires the conclusion that the barge was damaged when she was moored. The barge would *begin* to list within a half hour to an hour after receiving the damage she sustained [Scheibe, A. 110]. Jackson inspected the barge “shortly, very shortly after it came in” [Jackson, A. 49] and an hour or an hour and a half later she was discovered to be listing “quite badly” [Jackson, A. 50], due to a leak from a hole the size and shape of the “U bolt” [Jackson, A. 51; Bach, A. 78; Raimer, A. 87; Scheibe, A. 106, 107], in the bottom of the barge a distance from the Samson post equal to the length of the mooring line of the float [Bach, A. 79; Jackson, A. 44], measured around the rake of the barge.

This leaves only the suggestion, which appellants have not seriously advanced, that a passing ship could have been the outside motive force necessary to impel the barge upon the float with sufficient force to punch a hole through the four inch by twelve inch planking. Considering that the barge’s gross weight was 1,200 tons [Raimer, A. 95], her draft was nine feet [Raimer, A. 100, 103] and about three feet of the float was under water, we can appreciate that a wave far beyond any conceivable wash from a passing vessel would be required. Such a wave would surely have caused considerable damage to harbor installations. Had it occurred, appellants would certainly have seized upon it as the explanation required by these circumstances.

A barge, carefully and properly moored, does not ordinarily have a hole punched in her bottom by the “U bolt”

of a mooring float. Unexplained, the facts alone warrant the inference of negligence of appellants.

Johnson v. U. S. (1948), U. S., 92 L. Ed. (Adv.) 360, 68 S. Ct. 391, 1948 A. M. C. 218;

Jesionowski v. Boston & Maine R. Co. (1947), 329 U. S. 452, 91 L. Ed. 416, 67 S. Ct. 401;

Sweeney v. Erving (1913), 228 U. S. 233, 240, 57 L. Ed. 815, 33 S. Ct. 416.

While it is impossible to do more than speculate as to the precise manner in which the damage was caused, it is clear that the float was under the barge and that the “U bolt” punched a hole through its four-inch bottom planking. Raimer indicates [A. 95] that the float, when it was pushed to the end of the anchor line would be drawn under the rake of the barge in a vertical position; the barge would continue forward until the mooring cable became taut and the 1,200 ton momentum would “snap” the float into the bottom of the barge. Another possibility could be that the float tumbled as it went under the barge so that when the barge’s forward momentum was stopped, the float was upside down, and the bottom “U bolt” was punched through the planking. In either event the scratch and gouge leading to the hole are conclusive that the barge had substantial way at the time of the damage, when and as this damage was done.

The District Court at the close of counsels’ arguments stated [A. 211, 212] that the issue was one of fact for the Court and it would weigh the appellee’s circumstantial evidence together with any inference to be drawn from the *res ipsa loquitur* doctrine against testimony of appellants’ witnesses. The District Court, in its oral opinion [A. 213] and Findings of Fact [A. 24, 25] found that the

physical evidence outweighed the oral testimony. Appellee's position is that this finding is entirely correct.

The discussion of the doctrine of *res ipsa loquitur* in Appellants' Opening Brief is entirely inconsistent with the Supreme Court's exposition of the doctrine as expressed in the *Johnson* case,

Johnson v. U. S. (1948) (*supra*), U. S., 92 L. Ed. (Adv.) 360, 38 S. Ct. 391, 1948 A. M. C. 218.

The Court quoted from the *Jesionowski* case

Jesionowski v. Boston & Maine R. Co. (1947) (*supra*), 329 U. S. 452, 91 L. Ed. 416, 67 S. Ct. 401,

which applied the rule of

Swcency v. Erving (1913) (*supra*), 228 U. S. 233, 57 L. Ed. 815, 33 S. Ct. 416,

and said,

"The rule of *res ipsa loquitur* applied in *Jesionowski v. Boston & Maine R. Co.*, *supra*, means that 'the facts of the occurrence warrant the inference of negligence not that they compel such an inference.'"

There is no conflict in the legal principles applied in the *Johnson* case by the Supreme Court with the analysis of the doctrine by this Court in deciding that case.

Johnson v. U. S. (C. C. A. 9th, 1947) (*supra*), 160 F. (2d) 789, 1947 A. M. C. 765.

The difference in result was simply because the Supreme Court determined that the "facts of the occurrence" showed negligence of the fellow servant and this Court found that the "circumstances of this case are not such to justify a finding . . . of . . . negligence."

Appellee, of course accepts the propositions that the mere proof of an "accident" does not raise a presumption of negligence, and that the ultimate burden of proof remains with the party seeking recovery.

The inference of negligence to be drawn from consideration of all of the circumstances of this case was sufficient to place upon appellants the burden of going forward. Appellants went forward by offering the testimony of the tug crew. The case, were it before a jury, would then go to the jury, where the evidence would be weighed. The District Judge, here acting as a jury [A. 212], weighed the inference of negligence from appellee's evidence against the inferences to be drawn from appellants' evidence and found appellants' evidence incredible, unconvincing and unacceptable.

Appellants in their brief seem to object to the Court's "deductive process" and imply that the inference from the doctrine is not evidence properly to be considered with the other evidence in the case. This "process" is entirely proper. The Supreme Court has said unmistakably that the inference from the doctrine is evidence to be weighed by the fact finder.

Sweeney v. Erving (1913) (*supra*), 228 U. S. 233, 240, 57 L. Ed. 815, 33 S. Ct. 416, 418.

"In our opinion *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, *but it is evidence to be weighed* not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; *that they make a case to be decided by the jury*, not that they

forestall the verdict. *Res ipsa loquitur*, where it applies does not convert the defendant's general issue into an affirmative defense. *When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff.*" (Italics added.)

In this case, the District Court has found that appellee has met its burden to produce a preponderance of evidence. Appellants' argument resolves itself into disagreement with the result reached by the trier of the facts.

The case of

Liggett & Myers Tobacco Co. v. DeLape (C. C. A. 9th, 1940), 109 F. (2d) 598,

is similar in mechanics to this case. Plaintiff proved a set of circumstances (an exploding cigarette from a newly opened package) from which the reasonable inference of defendant's negligence followed. Defendant said, in effect, what appellant says here: "I was not negligent." Detailed testimony was offered as to the care used at all times including the time the defective cigarette was manufactured. The Court held that the inference arising from *res ipsa loquitur* retained its vitality after defendant had gone forward with the evidence and that the inference was still sufficient to support plaintiff's burden of proof. (See also the case of *Hurt v. Susnow* (1948), 85 A. C. A. 251, in which the inference of negligence raised by the *res ipsa* doctrine was held to be evidence and the inference was not rebutted by testimony of an interested party.)

Similarly here, the District Court has refused to accept appellants' version which merely denies negligence but offers no plausible explanation of the damage to the barge inconsistent with negligence of the tug's crew.

IV.

Conclusion: The Decree Should Not Be Disturbed.

Appellants' sole defense to this action is merely a denial by its employees that they were at fault.

The District Court found this disclaimer unconvincing and not acceptable [A. 25, 213]. There is substantial evidence to support this finding. The Court's decision is not only not clearly erroneous, but also the most probable inference to be drawn from the evidence. It should not be disturbed.

Respectfully submitted,

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No. 11885

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

The Tug ROCONA, her engines, tackle, apparel and furniture; JOHNSON WESTERN COMPANY, a corporation, and CASE CONNOLLY COMPANY, a corporation,

Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

FILED

JUN 30 1948

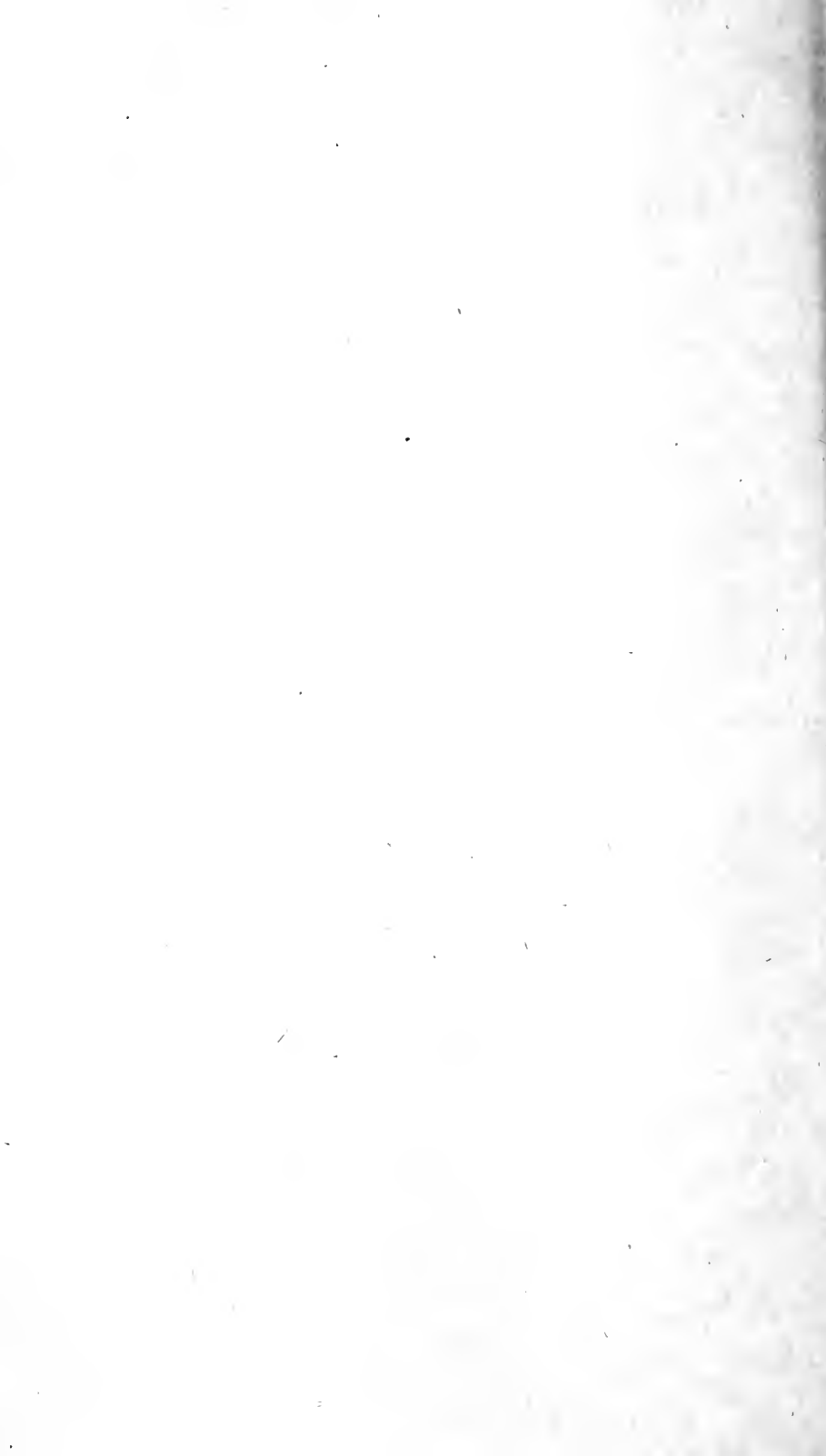
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GUY F. ATKINSON COMPANY, a corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

This reply to Appellee's Brief will be as short as possible, and will deal only with such features as appear to require comment. Appellants' theory, argument of the case and authorities were fully developed in the Opening Brief.

I.

The Findings of the District Court Are Merely Supported by a Rebuttal Prima Facie Presumption of Correctness and Will Be Upset if Clearly Erroneous.

In four pages at the commencement of appellee's argument in its brief, appellee has indexed twenty-six cases, accompanying none of them by any particularly enlightening comment. It probably would be more profitable in

terms of research were this court to refer to any standard digest under the appropriate subject heading rather than to the necessarily incomplete index of cases supplied by appellee in its first point of argument.

Appellee has cited *Heder v. U. S.*, decided by this court on May 5, 1948. The case is, as yet, unreported, and from the practical standpoint appellee apparently has a monopoly upon the decision; however, if it is of the same type as most of the other cases cited under Point I of Appellee's Brief, it merely states the general rule concerning the *prima facie* rebuttal presumption in favor of District Court findings, etc., and also similar to appellee's other cases, was probably decided upon compelling proof based upon clear and direct evidence.

We have read all of appellee's cases, save only *Heder v. U. S.*, above. *The Ernest H. Meyer*, 84 F. (2d) 496 (cert. den. 299 U. S. 600, 81 L. Ed. 442), was relied upon by us in our Opening brief (pp. 31, 32) and, though tried wholly upon depositions, adequately and clearly expounds the true rule concerning District Court findings in general and to which rule this court obviously will adhere.

Appellee, in addition to relying upon the case of *The Ernest H. Meyer*, above, likewise relies upon *Matson Navigation Co. v. Pope & Talbot* (C. C. A. 9, 1945), 149 F. (2d) 295 (cert. den. 326 U. S. 737, 90 L. Ed. 439). This court minutely weighed the whole evidence, came to a conclusion differing from that of the trial court, and *reversed* the decree below.

In most of the cases cited by appellee on this subject the appellate court has carefully weighed and considered

all of the evidence and, where the decree was affirmed, has reached an independent but concurring judgment.

The true import of appellee's apparent position would require this court virtually to refuse even to read the evidence given by appellants' witnesses. Mr. Justice Denman of this court in *The Ernest H. Meyer* case, above, has recognized that an admiralty appeal is not the same proceeding in respect to considering the evidence below, as that had upon a writ of error. The whole evidence is to be weighed and the appellate court requires that there be apparent *substantial* evidence, not merely *some* evidence, in support of the trial court's findings. (See App. Op. Br. p. 32.)

The character of the record in the case at bar differs essentially and substantially from practically all of the cases relied upon by appellee in that there is a total absence from the record of any conflicting direct evidence. The conflict in proof which inheres in this case is, on the contrary, between inferences, probabilities, speculations, guesses, etc. The Second Circuit has said (*The Albany*, 81 Fed. 966, 968-969):

"The 'personal equation' of the witnesses is of no assistance in determining what are or are not the probabilities of the case."

The Albany, above, presented a record strikingly similar in character to that before this court, and we respectfully request that this court again review appellants' treatment thereof, commencing at the bottom of page 49 and concluding on page 51, Appellants' Opening Brief.

II.

Appellants Are Not Required to Negative Every Possible Cause of the Damage, nor to Ascertain and Prove the Precise Manner, Time and Cause of the Hole in the Bottom of Barge No. 4414.

Appellee has forthrightly accepted the proposition that proof of the injury does not raise a presumption of negligence and that the ultimate burden of proof rests upon appellee. (Br. for App. p. 25.)

We have demonstrated (App. Op. Br. pp. 29, 43, 44) that the duty of identifying the cause or the time of the injury is not upon the appellants but that on the contrary, the duty is upon the appellee to exclude (as the necessary intendments of its proof) every reasonable hypothesis of a cause for which appellants would not be legally responsible.

Appellee merely presented “two or more states of case upon which one may theorize as to the cause of the accident.” (*Hughes v. Cincinnati etc. Ry. Co.*, 91 Ky. 526, 16 S. W. 275, quoted on p. 44, App. Op. Br.) We respectfully refer the court at this point to a reconsideration of pages 42-44, Appellants’ Opening Brief, where *The Pride*, 135 F. (2d) 999 (C. C. A. 2nd), is quoted on the subject of “. . . how much speculation must underlie any attempt on the evidence in this record to attribute the injury to the barge to some specific cause.”

Whether or not there was negligence in appellee’s loading of the barge and her resulting trim, that circumstance of being high at the bow and low at the stern would still

constitute a precondition making it easier for Barge No. 4414 to come afoul of the mooring float in some unidentified manner after she had crossed the Catalina Channel and acquired a considerable quantity of free water in her hold. [Ap. p. 114.]

Appellee has attempted little, if any, assistance to this court in analyzing the effect of the evidence. Possibly a detailed analysis of the evidence to establish by compelling inference which would exclude all reasonably possible causes for which appellants would not be liable, “would not write.” An attempt is made in the Brief for Appellee to reconstruct speeds and distances (Br. for App. p. 15) and thus to come up with the conclusion of sufficient momentum on the barge to overrun the float and punch a hole in her bottom. We respectfully submit that appellee’s effort is unconvincing and a most unreliable and untrustworthy argument.

In the first section of its argument (Br. for App. p. 10) appellee confidently refers to the finding [Ap. p. 25] that the testimony of the witnesses for appellants was not convincing and could not be accepted—the finding, of course, being that drafted by the appellee and not by the court. Thereafter, throughout its brief appellee time and again supports its argument by repeated references to and quotations from testimony given by appellants’ witnesses. We would suggest that appellee should make up its mind one way or the other, either to stay with the apparent original thesis that those witnesses were wholly incredible,

or that appellee's later position is the proper one, *i. e.*, that such witnesses were believable for at least some purposes.

The actual reaction in the trial judge's mind was that the physical facts "speak louder than the words of the witnesses." [Ap. p. 213.] We submit, of course, that he was in error in thus permitting the proven physical facts such as they were to outweigh the credible, direct and unimpeached oral testimony of the Captain and his crew. The trial judge did not say that he did not *believe* appellants' witnesses—those words of disbelief and non-acceptance were coined by appellee's counsel for the findings.

We trust that the court will not be misled by the statement found in the middle of page 16, Brief for Appellee, to the effect that "the barge had way and was moving into the float, pushing it along ahead of the barge." That statement is gratuitous from appellee's counsel and finds no support whatever in the evidence.

Appellee refers (Br. for App. p. 20) to the opinion of the surveyor that the barge overrode the mooring float and was punctured by the "U" bolt. [Scheibe, Ap. p. 107.] He did so testify, but that falls far short of opinion evidence that the *tug* was in any manner responsible for such overriding. As we previously mentioned in our Opening Brief (pp. 27, 28), Mr. Scheibe did no more than negative the ordinary and usual conditions of current, tide and surge as the cause.

III.

Res Ipsa Loquitur Is Not Applicable Because the Supposedly Speaking “Thing” Was Not Proved to Be a Link in the Causal Chain Connecting an Act or Omission of Appellants to the damage to the Barge.

The speaking “thing” in this case, were *res ipsa loquitur* applicable, would be the maneuvering and moving of the barge by the RoCONA to the mooring block. The enduring and unbridged gap is the identification of the time of injury as occurring directly and proximately from some act committed or omitted *before* the tug released control of the barge.

Before reaching the final step in the application of *res ipsa loquitur*, i. e., inference of negligence, it is first necessary to presume or infer that the RoCONA was in charge of the barge when damaged and *at the same time* further presume or infer that the injury occurred by towing over or permitting the barge to drift over, the float. It piles too many unreliable and unsupported presumptions upon presumptions and makes impossible any just application of the doctrine.

We refer this court to our previous discussions along the same lines on pages 49-50 and 54-55, Appellants’ Opening Brief.

In Appellants’ Opening Brief (p. 59) it was mentioned that two of the cases relied upon by appellee (*Johnson v. U. S.*, U. S., 92 L. Ed. (Adv.) 360, and *Jesionowski v. Boston & Maine R. Co.*, 329 U. S. 452, 91 L. Ed. 416, 67 S. Ct. 401) were not of assistance in this matter, for the reason that the facts are entirely at variance. The primary difficulty in the case at bar is the factual situation as justifying or not justifying the application of the rule.

Appellee's case of *Sweeney v. Erving*, 228 U. S. 233, 57 L. Ed. 815, is not applicable as an authority, for the reason that the court did not consider the case as involving *res ipsa loquitur*:

"In the view we take of the matter, it is not necessary to pass upon the question whether the evidence presented a case for the application of the rule *res ipsa loquitur*; for the reason that in cases where that rule does apply, it has not the effect of shifting the burden of proof."

Appellee's cited case of *Liggett & Myers Tobacco Co. v. De Lape* (C. C. A. 9th, 1940), 109 F. (2d) 598, 601, was a case of "foreign substance." All such cases have been accorded somewhat different treatment in regard to *res ipsa loquitur* and are decided on principles inapplicable to the instant case. The opinion, however, does have two very pertinent sentences (p. 601):

"The presence of the thing leaves open no reasonable hypothesis that the objectionable presence occurred notwithstanding uninterrupted care. The doctrine is not applicable where the *causa injuria* may have originated from sources foreign to the manufacture of the thing sold."

Paraphrasing, we might say that the doctrine is not applicable in the case at bar where the *causa injuria* may have been attributable to something other than the act or omission of the tug RoCONA.

Appellee's wholly erroneous view of the rules applicable in these circumstances is disclosed in the final paragraph (p. 26) of Brief for Appellee, wherein it is argued that appellants should have proved some plausible explanation of the damage inconsistent with supposed negligence on the part of the tug. That is not the law but it is apparently what the trial court would require.

Conclusion.

Appellee's reply to the appellants fails wholly to meet the appellants' demonstration of clear and substantial error in the trial court and takes no notice whatever of the many compelling authorities clearly in point and which were analyzed and applied at length in Appellants' Opening Brief. Appellee's Brief exudes supreme confidence and a feeling of security bordering closely upon disdain for appellants' presumptuous (*sic*) attack upon the trial court's interlocutory decree, by appealing therefrom.

We agree with appellee's admission (Br. for App. p. 23) that "it is impossible to do more than speculate" in this case as to how the damage to Barge No. 4414 was caused. Appellants respectfully submit that an Interlocutory Decree founded upon speculation and guessing, unbuttressed by substantial evidence, will not be permitted by this court to stand.

The Interlocutory Decree and Order of Reference should be reversed and the libel should be dismissed.

Respectfully submitted,

HILL, MORGAN & FARRER,

By WILLIAM S. SCULLY,

Proctors for Appellants.

No. 11886

United States
Circuit Court of Appeals
For the Ninth Circuit

CALVERT F. WILEY,

Appellant,

vs.

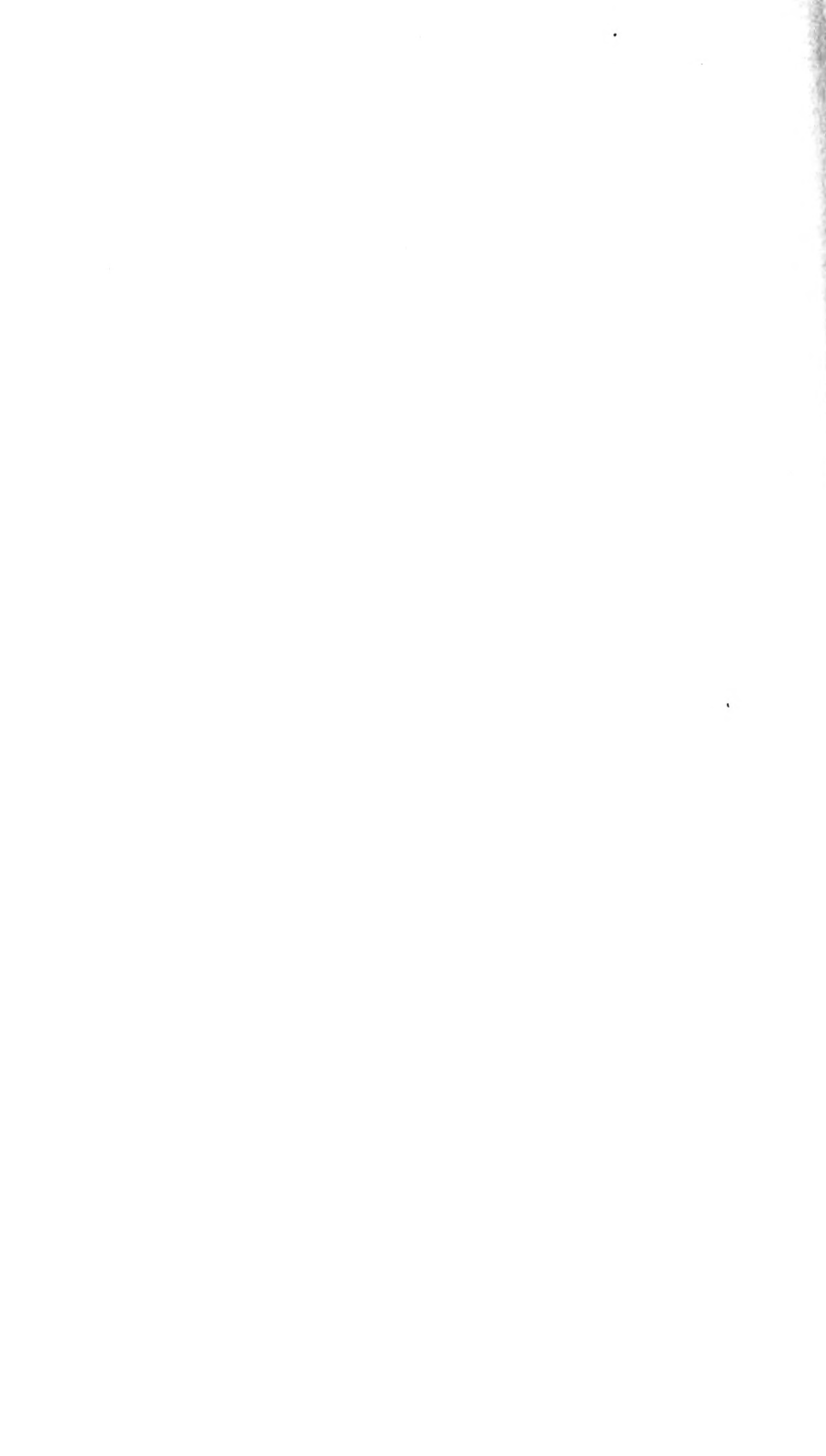
UNITED STATES OF AMERICA, OLIVER J.
OLSON & CO., a Corporation, and UNITED
STATES LINES CO., a Corporation,
Appellees.

Apostles on Appeal

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED
APR 24 1948

PAUL P. O'BRIEN,
CLERK



No. 11886

United States
Circuit Court of Appeals

For the Ninth Circuit

CALVERT F. WILEY,

Appellant,

vs.

UNITED STATES OF AMERICA, OLIVER J.
OLSON & CO., a Corporation, and UNITED
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NAMES AND ADDRESSES OF PROCTORS

GLADSTEIN, ANDERSON, RESNER &
SAWYER,
HERBERT RESNER,
240 Montgomery Street,
San Francisco, California.

Proctors for Libelant and Petitioner.

FRANK J. HENNESSY,
United States Attorney.

C. ELMER COLLETT,
Assistant United States Attorney.
Post Office Building,
San Francisco, California

Proctors for Respondents and
Appellee.

Trial Before the Honorable Michael J. Roche,
District Judge, Sitting Without a Jury

In the United States District Court, for the Northern District of California, Southern Division—
in Admiralty

No. 24925-R

CALVERT F. WILEY,

Libelant,

vs.

UNITED STATES OF AMERICA; OLIVER J. OLSON & CO., a Corporation; UNITED STATES LINES CO., a Corporation; THE DOE COMPANY, JOHN DOE, and RICHARD ROE,

Respondents.

LIBEL IN PERSONAM

(For damages for personal injury, under the Suits in Admiralty Act and the Public Vessels Act)

To the Honorable the Judges of the Above-Entitled Court:

The libel of Calvert F. Wiley against the United States of America, Oliver J. Olson & Co., a corporation, and United States Lines Co., a corporation, against the SS E. A. Bryan, owned by the [1*] United States of America and managed, navigated, maintained and operated by Oliver J. Olson & Co., a corporation, against the SS Quinault Victory, owned by the United States of America and managed, navigated, maintained and operated by United States Lines Co., a corporation, and against all

* Page numbering appearing at top of page of original certified Transcript.

persons lawfully intervening for their interests, in a cause of action for damages under the Suits in Admiralty Act and the Public Vessels Act, civil and maritime, alleges:

I.

That the United States vessel, SS E. A. Bryan, is a vessel of United States registry and now is, and during all the times herein mentioned was, owned by the United States of America and was managed, maintained, operated, and navigated by the said Oliver J. Olson & Co., a corporation, as general agent for and on behalf of respondent, United States of America.

That the United States vessel, SS Quinault Victory, is a vessel of United States registry and now is, and during all the times herein mentioned was, owned by the United States of America and was managed, maintained, operated, and navigated by the said United States Lines Co., a corporation, as general agent for and on behalf of respondent United States of America.

II.

That the respondents United States of America, Oliver J. Olson & Co., a corporation, and United States Lines Co., a corporation, respectively, maintain offices and principal places of business, in connection with the matters of which complaint is made in the within libel, in the City and County of San Francisco, [2] State of California, and said respondents are within the jurisdiction of the above-entitled Court.

III.

That the respondents The Doe Company, John Doe, and Richard Roe are sued herein under fictitious names; that libelant does not know the true names thereof and, therefore, prays leave to insert said true names when ascertained.

IV.

That libelant brings and maintains this action pursuant to the provisions of 46 USCA, §§741 to 752, commonly known as the Suits in Admiralty Act; also pursuant to the provisions of 46 USCA, §§ 781 to 790, commonly known as the Public Vessels Act.

V.

That libelant is, and during all of the times herein mentioned was a resident of Port Chicago, California, and resides within the jurisdiction of the above-entitled Court.

VI.

That on July 17, 1944, libelant was in the employ of respondent United States of America, to wit, United States Navy, in the capacity of carpenter at Port Chicago, California, at wages totaling \$75 per week.

VII.

That on said date of July 17, 1944, respondents owned, operated, managed and controlled said vessels, SS E. A. Bryan and SS Quinault Victory, which vessels were docked at said Port Chicago, California. That said vessels were then and there under the exclusive care, operation, management, and control of the said [3] respondent. That the

respondent United States of America did then and there own, operate, manage and control a certain pier, wharf, dock and loading platform to which said vessels were anchored or tied up.

That respondents were then and there engaged in loading, or otherwise handling, cargoes of ammunition aboard and in the vicinity of said vessels and along and upon said docks, wharf, pier and loading platform. That the respondents did then and there so negligently and carelessly handle, load, keep, maintain and use said cargoes of ammunition, said vessels, and said dock, wharf, pier and loading platform that said ammunition was caused to and it did violently and forcibly explode, and as a direct and proximate result thereof libelant, who was working on said dock, wharf, pier and loading platform, was caused to and he did suffer and incur severe and grievous personal injuries, as follows: libelant's left arm was crushed; libelant suffered ammunition wounds and cuts, scars, abrasions and injury to his face, back, right leg, neck, and other parts of libelant's body. That libelant's injuries are of a continuing nature and have continued and persisted from the date of injury to the date hereof. That libelant has been forced to and he has received two operations to said injured left arm, and that said injuries have caused libelant severe and grievous mental and physical pain and suffering, and libelant is informed and believes and alleges that said injury to his left arm will be permanent in character. That all of said injuries have caused libelant general damages in the amount of \$75,000.

VIII.

That libelant was gainfully employed and earning at least \$75 per week as wages at the time of said accident and explosion. That as a direct and proximate result of said explosion and the negligence and carelessness of respondents as herein alleged and the injuries suffered by libelant, libelant has lost approximately ten months employment, all to his general damage on account of wage loss in the amount of \$3,225.

That libelant is informed and believes and alleges that he will suffer further loss of wages on account of said injuries, and prays leave to amend his libel and insert herein, or offer proof at the time of trial, the amount of such further loss of wages when the same has been ascertained:

IX.

That from the date of his injury, to wit, July 17, 1944, and extending for a considerable period of time thereafter, libelant was under the care of doctors and was obtaining hospitalization. That said medical attention and treatment has continued until the time hereof and still continues. That from July 17, 1944, until the time hereof libelant has attempted to learn from respondents what redress or remedy he had by virtue of the injuries inflicted upon libelant by respondents. That respondents informed and advised libelant that the only redress or remedy he had was by compensation under the United States Employee's Compensation Law. That libelant did not learn until within six weeks prior

to the filing of this libel that he had a remedy or relief by virtue of the statutes pursuant to which this action is brought. [5] That libelant's rights in this regard were not finally determined under any circumstances until the decision by the United Employees' Compensation Law. That libelant did not learn until within six weeks prior to the filing of this libel that he had a remedy or relief by virtue of the statutes pursuant to which this action is brought. That libelant's rights in this regard were not finally determined under any circumstances until the decision by the United States Supreme Court in the case of *Porello v. United States*, No 69, October Term 1946, decided March 10, 1947. That if there is a two-year period of limitation under the Suits in Admiralty Act and the Public Vessels Act, said period of limitations has been tolled by virtue of the facts and circumstances set forth herein.

X.

That all and singularly the allegations hereof are true and are within the admiralty and maritime jurisdiction of the above-entitled Court.

Wherefore, libelant prays that process in due form of law according to the course of this Honorable Court and in causes of admiralty and maritime jurisdiction may issue against said respondents, and each of them, and that citation in personam may issue against said respondents, and each of them, and that they be cited and required to appear and answer upon oath all and singular the matters aforesaid, and that this Honorable Court

may be pleased to decree the payment to libelant by respondents, and each of them, of the sum of \$75,000 general damages, plus wages in the amount of \$3,225, plus future wage loss when [6] ascertained, for costs of suit incurred herein, and for such other and further relief as is meet and just in the premises.

Dated: April 16, 1947.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
HERBERT RESNER,
Proctors for Libelant.

State of California,
City and County of San Francisco—ss.

Herbert Resner, being first duly sworn, deposes and says:

That he is proctor for libelant in the within and foregoing libel and makes this verification for and on behalf of libelant for the reason that said libelant is presently out of the county in which affiant has his office; that affiant has read said libel and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information or belief, and as to those matters he believes it to be true.

HERBERT RESNER.

Subscribed and sworn to before me this 16th day of April, 1947.

[Seal] DOROTHY H. McLENNAN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed April 18, 1947. [7]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of California,

City and County of San Francisco—ss.

Herbert Resner, being sworn, says that he is a citizen of the United States, over 18 years of age, a resident of the City and County of San Francisco, and proctor for libelant in the within action. That affiant's business address is 240 Montgomery Street, San Francisco, California. That affiant served copies of the Seaman's Libel in Personam on file herein by placing said copies in envelopes addressed to:

United States Attorney General, Washington, D. C., and Frank J. Hennessy, Esq., United States Attorney, Post Office Building, San Francisco, California

which envelopes were then sealed and postage fully prepaid thereon, and thereafter were on April 21, 1947, forwarded by registered mail from San Francisco, California.

That there is delivery service by United States mail at the places so addressed, or regular communication by United States mail between the place of mailing and the places so addressed. [8]

HERBERT RESNER.

Subscribed and sworn to before me this 21st day of April, 1947.

[Seal]

ALICE C. MORSE,

Notary Public in and for the City and County of San Francisco, State of California

[Endorsed]: Filed April 23, 1947. [9]

District Court of the United States, Northern District of California, Southern Division.

No. 24925-R

SEAMAN'S ACT

The President of the United States of America to the Marshal of the United States for the Northern District of California—Greetings:

Whereas, a Libel has been filed in the District Court of the United States for the Northern District of California, Southern Division, on the 18th day of April, 1947.

By Calvert F. Wiley, libellant, v. United States of America; Oliver J. Olson & Co., a corporation; United States Lines Co., a corporation; The Doe Company, John Doe and Richard Roe, respondents, in a certain action for damages, civil and maritime, to recover the sum of \$78,225 (as in said Libel will more fully and at large appear) therein alleged to be due the said libellant Calvert F. Wiley and praying that a citation may issue against the said respondent pursuant to the rules and practice of this Court;

Now, Therefore, we do hereby empower and strictly charge and command you, the said Marshal, that you cite and admonish the said respondents, if they shall be found in your District, that they be and appear before the said District Court on the 29th day of April, 1947, at 10 o'clock a.m. at the Court Room in the City and County of San Francisco, then and there to answer the said Libel and

to make their allegations in that behalf, and have you then and there [10] this writ with your return thereon.

Witness the Honorable Michael J. Roche, Judge of said Court, at the City and County of San Francisco, in the Northern District of California, this 18th day of April, 1947.

[Seal]

C. W. CALBREATH,
Clerk,

By C. A. TROLLIET,
Deputy Clerk.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
Proctor for Libelant.

MARSHAL'S RETURN

I have served this writ personally by copy on Oliver J. Olson & Company by serving Oliver J. Olson, Jr., as President at San Francisco, California, and on United States Lines Co. by serving B. H. Parkinson as Agent at San Francisco, California, this 21st day of April, A. D. 1947.

GEORGE VICE,
U. S. Marshal.

HERBERT R. COLE,
Deputy Marshal.

Marshal's Fees: Travel, Service, \$4.00.

[Endorsed]: Filed April 29, 1947. [11]

[Title of District Court and Cause.]

MOTION TO DISMISS

Now comes the respondents United States of America, Oliver J. Olson & Co., a corporation, and United States Lines Co., a corporation, and move the Court to dismiss this suit on the following grounds:

I.

That as to respondent United States of America, it appears from the libel that the alleged injury for which damages are claimed arose not later than July 17, 1944, and that the libel herein was filed April 18, 1947. By reason of the premises it appears from the face of the libel that suit was not brought within two years from the accrual of the cause of action, as required by Section 5 of the Suits in Admiralty Act, 1920, 46 U.S.C. 745.

II.

That the libel on file does not state a cause of action within the admiralty jurisdiction of this Court.

III.

That as to respondent United States of America, said libel does not state facts sufficient to constitute a cause of action against said respondent for which said respondent has consented to be sued.

IV.

As to respondents Oliver J. Olson Co., and United States Lines Co., said libel does not allege facts sufficient to constitute a [12] cause of action against said respondents.

V.

That the United States Employees' Compensation Act, 5 U.S.C. 751, provides the exclusive remedy for libelant's injury.

Wherefore, respondents pray that said libel be dismissed with prejudice.

/s/ FRANK J. HENNESSY,
United States Attorney.
WILLIAM E. LICKING,
/s/ C. ELMER COLLETT,
Assistant United States
Attorney,
Proctors for Respondents.

NOTICE OF MOTION

To: Libelant Above-Named, and to Messrs. Gladstein, Andersen, Resner, Sawyer & Edises, 240 Montgomery Street, San Francisco 4, California, His Attorneys:

Please Take Notice That the undersigned will bring the attached Motion to Dismiss on for hearing before this Court at Room No. 338, Post Office and Court House Building, City and County of San Francisco, California, on the 8th day of September, 1947, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ FRANK J. HENNESSY,
United States Attorney.
WM. E. LICKING,
Ass't. U. S. Attorney.
C. ELMER COLLETT,
Assistant United States
Attorney,
Attorneys for Respondents.

[Endorsed]: Filed Aug. 21, 1947. [14]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 24,925-R

In Admiralty

CALVERT F. WILEY,

Libelant,

vs.

UNITED STATES OF AMERICA; OLIVER J.
OLSON & CO., a Corporation; UNITED
STATES LINES CO., a Corporation; THE
DOE COMPANY, JOHN DOE and RICH-
ARD ROE,

Respondents.

ORDER DISMISSING LIBEL

Libelant seeks to recover damages for injuries alleged to have been sustained by him while working on a loading dock as a carpenter, in which capacity he was employed by the United States Navy. Injuries so sustained are non-maritime and do not fall within the admiralty jurisdiction of this court. See *U. S. v. Marine*, 155 F. 2d 456, *The Admiral Peoples*, 295 U. S. 649. It is, therefore, by the Court.

Ordered that the motion of respondents to dismiss the within action be and the same hereby is Granted and said Libel shall be and the same hereby is Dismissed.

Dated: December 30th, 1947.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Dec. 30, 1947. [15]

[Title of District Court and Cause.]

LIBELANT'S PETITION FOR APPEAL AND
ORDER ALLOWING APPEAL

Comes now the libelant herein, Calvert F. Wiley, and being aggrieved by the Order Dismissing Libel, judgment and decree made and entered herein on December 30, 1947, by the above-entitled United States District Court, does hereby claim an appeal from said Order, judgment and decree to the United States Circuit Court of Appeal for the Ninth Circuit, and prays that his said appeal may be allowed.

The points and grounds of appeal are the following:

(1) The Order Dismissing Libel and the decree and judgment of the Court dismissing the above-entitled action upon the ground that the Court lacked jurisdiction are contrary to law and are in error.

(2) The Court erred in failing to consider and determine the above-entitled cause on its merits.

Dated: February 2, 1948.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
HERBERT RESNER,

Proctors for Libelant and
Appellant. [16]

ORDER ALLOWING APPEAL

The within appeal is hereby allowed.

Done in Open Court This 3rd Day of February,
1948.

LOUIS E. GOODMAN,

Judge of the United States
District Court.

[Endorsed]: Filed Feb. 6, 1948. [17]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Comes now the libelant herein, Calvert F. Wiley, and hereby assigns as error in the proceedings, orders, decision, judgment and decree of the above-named District Court in the above-entitled action the following:

- 1) That the District Court erred in law in dismissing for lack of jurisdiction the libel of libelant herein and in ordering a decree and judgment for respondents.
- 2) That the Order Dismissing Libel for want of jurisdiction made and entered herein on December 30, 1947, is contrary to law.
- 3) The District Court should have considered this case on its merits and erred as a matter of law in failing so to do.

Dated: February 2, 1948.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
HERBERT RESNER,

Proctors for Libelant and
Appellant.

[Endorsed]: Filed Feb. 6, 1948. [18]

[Title of District Court and Cause.]

LIBELANT'S DESIGNATION OF APOSTLES
ON APPEAL AND PRAECIPE THEREFOR

To Frank J. Hennessy, United States Attorney,
Post Office Building, 7th and Mission Streets,
San Francisco, California, Proctor for Re-
spondent; Messrs. Brobeck, Phleger & Harrison,
111 Sutter Street, San Francisco, California,
Proctors for Respondent; Carl W. Calbreath,
Clerk of the United States District Court for
the Northern District of California, Southern
Division:

Libelant hereby designates and requests that the
record on appeal in the above-entitled action shall
include:

1. Libel in Personam.
2. Citation in Personam.
3. Affidavit of service by mail.
4. Motion to dismiss, by respondents.
5. Order Dismissing Libel of December 30, 1947.
6. Petition for Appeal.
7. Order Allowing Appeal.
8. Assignments of Error, proposed by libelant.
9. Libelant's Designation of Apostles on Appeal
and Praecipe therefor. [19]

Dated: February 2, 1948.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
HERBERT RESNER,

Proctors for Libelant and
Appellant.

[Endorsed]: Filed Feb. 6, 1948. [20]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including April 13, 1948, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: March 4, 1948.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Mar. 4, 1948. [21]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 21 pages, numbered from 1 to 21, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Calvert F. Wiley, Libellant, vs. United States of America, et al., Respondents, No. 24925-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on ap-

peal is the sum of \$6.90 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 24th day of March, A.D. 1948.

[Seal]

C. W. CALBREATH,

Clerk.

/s/ M. E. VAN BUREN,

Deputy Clerk. [22]

In the United States District Court for the
Northern District of California, Southern
Division

No. 24925-R

In Admiralty

CALVERT F. WILEY,

Libellant,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

CITATION ON APPEAL

To Respondents Above Named and to Frank J. Hennessy, Esq., and Messrs. Brobeck, Phleger & Harrison, Their Proctors:

Whereas, the libellant herein, Calvert F. Wiley, has lately appealed to the United States Circuit

Court of Appeals for the Ninth Circuit from the entry of the decree in favor of the respondent, United States of America and against libelant, which decree was entered in the District Court of the United States of America for the Northern District of California, Southern Division, on the 30th day of December, 1947,

You Are, Therefore, Hereby Cited to Appear before the said United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, at the next term of said Court, thirty days after the date of this citation, to do and receive what may appertain to justice to be done in the premises. [23]

Given Under My Hand in the City and County of San Francisco, State of California, in the Ninth Circuit, on the 3rd day of February, 1948.

/s/ LOUIS E. GOODMAN,

Judge of the United States
District Court.

[Endorsed]: Filed Feb. 6, 1948. [24]

[Endorsed]: No. 11886. United States Circuit Court of Appeals for the Ninth Circuit. Calvert F. Wiley, Appellant, vs. United States of America, Oliver J. Olson & Co., a Corporation, and United States Lines Co., a Corporation, Appellees. Apostles on Appeal. Upon Appeal From the District Court of the United States for the Northern District of California, Southern Division.

Filed March 24, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11886

CALVERT F. WILEY,

Appellant,

vs.

UNITED STATES OF AMERICA, et al.,

Appellees.

STATEMENT OF POINTS ON WHICH LIBEL-
ANT AND APPELLANT INTENDS TO
RELY ON APPEAL AND DESIGNATION
OF RECORD ON APPEAL

Comes now the libelant and appellant herein and designates the following points on which he intends to rely on appeal:

1) That the District Court erred in law in dismissing for lack of jurisdiction the libel of libelant herein and in ordering a decree and judgment for respondents.

2) That the Order Dismissing Libel for want of jurisdiction made and entered herein on December 30, 1947, is contrary to law.

3) The District Court should have considered this case on its merits and erred as a matter of law in failing so to do.

Libelant and appellant designates the entire record as certified to the above-entitled Court as the record on appeal herein.

Dated: April 2, 1948.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
HERBERT RESNER,
Proctors for Libelant and
Appellant.

Receipt of a copy of the within document is hereby acknowledged the 5th day of April, 1948.

FRANK J. HENNESSY,
Attorney for Appellee.

[Endorsed]: Filed April 5, 1948.

No. 11889

United States
Circuit Court of Appeals
For the Ninth Circuit.

C. T. POTTER, et al.,

Appellants,

vs.

KAISER COMPANY, INC., a corporation, and
UNITED STATES OF AMERICA,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

MAY 21 1948

PAUL P. O'BRIEN,
CLERK



No. 11889

United States
Circuit Court of Appeals
For the Ninth Circuit.

C. T. POTTER, et al.,

Appellants,

vs.

KAISER COMPANY, INC., a corporation, and
UNITED STATES OF AMERICA,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

GREEN AND LANDYE,

Corbett Building,

Portland, Ore.,

For Appellant.

TOM C. CLARK,

Attorney General,

PEYTON FORD,

Assistant Attorney General,

Washington, D. C.;

HENRY L. HESS,

United States Attorney,

Portland, Ore.,

For Intervenor.

THELEN, MARRIN, JOHNSON & BRIDGES,

RICHARD DEVERS and

GORDON JOHNSON,

111 Sutter Street, San Francisco, and

HART, SPENCER, McCULLOCH &

ROCKWOOD,

Yeon Building,

Portland, Oregon,

For Appellee.

District Court of the United States for the
District of Oregon

Civil Action File No. 3030

C. T. POTTER,

Plaintiff,

vs.

KAISER COMPANY, INC., a Corporation,

Defendant.

SUMMONS IN A CIVIL ACTION

To the above-named Defendant:

You are hereby summoned and required to appear and defend this action and to serve upon Green & Landye, plaintiff's attorneys, whose address is 1003 Corbett Building, Portland 4, Oregon, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal]

LOWELL MUNDORFF,

Clerk of Court.

By /s/ F. L. BUCK,

Chief Deputy Clerk.

Date: Jan. 17, 1946.

[Endorsed]: Filed January 24, 1946. [1*]

Return on Service of Writ

I hereby certify and return, that on the 17th day of Jan., 1946, I received the within summons and that I served the same on the 23d of Jan., 1946, at Portland, in the State and District of Oregon, by delivering a copy thereof together with a copy of the Complaint in the within entitled cause to the therein named Kaiser Co., Inc., a corporation, by serving George E. Clinton, Office Mgr. and Statutory Agt., at the office of the company at Swan Island at 4 p.m. personally.

JACK R. CAUFIELD,
United States Marshal.

By /s/ ALBERT A. PRICE,
Deputy United States
Marshal.

Marshal's Fees

Travel	\$.20
Service	2.00
Total	<hr/> \$2.20

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now the plaintiff, and based upon stipulation and order of court files this his amended complaint, and for cause of action against the above-named defendant complains and alleges:

I.

That this action is brought to recover from defendant unpaid overtime compensation and an additional amount equal to the amount of such unpaid overtime compensation as liquidated damages, pursuant to the Fair Labor Standards Act of 1938 (29 U.S.C.A., sections 201-219, inclusive, hereinafter referred to as the Act.

II.

That jurisdiction is conferred on this court by section 48 (8), 28 U.S.C.A. (Judicial Code) 24, giving the District Court original jurisdiction "of all suits and proceedings arising under any law regulating commerce," and by section 16 (b) of the Act.

III.

That at all times hereinafter mentioned defendant was and now is a corporation, duly organized and existing under and by virtue of the laws of the state of Nevada, with a principal office and place of business in the city of Portland, Oregon, and engaged in interstate commerce and in the production of goods for interstate commerce, within the meaning of said Act, in that the [2] defendant was and now is engaged in the operation of a shipyard at

Swan Island, in the city of Portland, state of Oregon, known as the Kaiser Company, Inc., Swan Island Yard, at which defendant was and now is engaged in the construction of ships, all of which have been produced from materials 90% of which were shipped to the defendant's said yard from points outside the state of Oregon and 100% of said ships have been produced for interstate commerce and have been sold and delivered and offered for sale and delivery in interstate commerce by defendant from said defendant's shipyard at Swan Island, Portland, Oregon, to various points outside the state of Oregon, and that in addition, by reason of the fact that at said yard defendant was and now is engaged in the repair of ships, 100% of which are regularly engaged in interstate commerce and have come to said yard for repairs from points outside the state of Oregon and are now en route after said repairs to points outside the state of Oregon; that 100% of the materials used in said repairs are shipped to defendant's yard from points outside the state of Oregon.

IV.

That at all times hereinafter mentioned, and particularly between February 1, 1942, and May 1, 1946, defendant employed guards at said Swan Island Yard, whose occupations were at all times herein mentioned, and now are, an integral and indispensable part of said operation and necessary to the production of said ships for interstate com-

merce, and the repair of ships engaged in interstate commerce, as hereinbefore stated, for the reason that, among other things, the said guards protected the yard from fire, sabotage and lawlessness that otherwise might have prevented, interfered with or impeded the production and repair thereof.

V.

That at all times hereinafter mentioned plaintiff and those similarly situated whose names are set out in Exhibit A, attached hereto and by reference made a part hereof, were employed by said defendant as guards; that plaintiff and the individuals whose names appear in Exhibit A had duties which included, [3] among other things, protection of said yard from fire, sabotage and lawlessness, and the performance of said duties by plaintiff and other employees similarly situated was an occupation necessary to the production of said ships for interstate commerce, as aforesaid, and was also an integral and indispensable and necessary part of the repair of ships engaged in interstate commerce, as aforesaid.

VI.

That between said dates aforementioned plaintiff and those similarly situated, set out in Exhibit A, were compelled and required to work the hours of overtime set opposite their names in said Exhibit A in the second column, for which they were not compensated; that by reason of the defendant requiring the plaintiff and other employees similarly situated

to work in excess of said forty hours per week without the payment of overtime for which they received no compensation, plaintiff and other employees similarly situated are entitled to the sum of money set opposite their names in said Exhibit A in the last column, together with an additional equal sum as liquidated damages, as provided for in the Fair Labor Standards Act.

VII.

That by virtue of the provisions of section 16 (b) of said Act, plaintiff has employed attorneys, and is entitled to be awarded a reasonable attorneys' fee of \$100,000.00 herein.

VIII.

That prior to the commencement of this action, those employees who were similarly situated with plaintiff, and whose names appear in said Exhibit A, have designated the plaintiff as their agent and representative to maintain this action for and on their behalf.

Wherefore, plaintiff demands judgment against the above named defendant for the full sum of One Hundred Sixty-eight Thousand Five Hundred Four and 08/100 (\$168,504.08) Dollars and the further sum of One Hundred Thousand (\$100,000.00) Dollars, attorneys' fees, and for his costs and disbursements incurred herein.

GREEN & LANDYE,

Attorneys for Plaintiff. [4]

EXHIBIT A

Overtime rate per hour \$1.57½

Name	Hours of Overtime	Total
Potter, C. T.	250	\$ 393.18
Abbott, Charles	806	1,268.84
Adams, V. L.	673	1,061.26
Allwen, Philip	174	274.26
Allen, S. M.	639	1,007.14
Anderson, A. C.	201	316.34
Anderson, Carl E.	167	259.32
Anderson, Helen S.	82	129.26
Anderson, John A.	268	422.66
Anderson, O. I.	940	1,481.32
Arata, H. A.	869	1,365.98
Aspland, Hubert G.	547	860.90
Bailey, G. D.	727	1,145.96
Baldwin, J. W.	327	514.68
Balfour, A. H.	880	1,386.76
Bane, Del W.	155	244.42
Bartels, Edward	320	501.80
Bassett, H. L.	8	12.02
Berberick, Al O.	130	205.30
Berg, Fred J.	29	45.38
Bergholt, C. T.	207	326.68
Betts, H. L., Sr.	537	845.42
Billingsley, Hoil	275	433.58
Boylan, H. W.	121	190.86
Briedwell, Paul R.	179	281.54
Broderson, August	604	950.98
Broderson, J. A.	541	852.78
Brown, C. D.	200	315.12
Brown, Geo. D.	151	237.44
Brown, H. T.	622	979.98
Bucholts, W. M.	620	978.96
Buckner, Melvin E.	531	835.96
Buhite, J. S.	975	1,535.30
Burnett, W. W.	676	1,064.12
Burnette, Ralph	66	104.14

Name	Hours of Overtime		Total
Burns, Frank J.	227	\$	347.58
Burns, W. R.	589		928.42
Butterfield, A. E.	270		425.53
Carey, S. A.	291		458.80
Carlson, C. E.	275		433.58
Carmody, J. F.	90		142.20
Casey, Robert S.	229		360.12
Caswell, L. L.	37		58.46
Charles, E. F.	978		1,541.12
Christensen, L. A.	684		1,077.88
Clifton, Harold G.	86		135.24
Collins, Fred	113		178.20
Conn, C. M.	250		396.02
Conover, H. C.	387		610.32
Conway, Tom J.	347		546.44
Cozad, Chas. H.	963		1,516.18
Cranford, Louis J.	182		287.02
Crum, Wm. A.	105		164.80
Curveon, James L.	635		1,000.32
Daley, John J.	207		325.48
Davenport, W. E.	907		1,428.90
Davis, Floyd E.	767		1,207.78
Deady, M. E.	118		285.22
Desoer, J.	161		253.92
Deters, J. A.	291		457.84
Dockham, R. C.	139		219.06
Dow, D. H.	447		703.82
Eagen, Raymond George	256		403.54
Ebeling, Jessie M.	511		804.72
Ehrmantrout, F. R.	423		655.74
Elliott, J. W.	594		935.32
Elliott, S. L.	445		700.70
Engelsgaard, Sarah E.	670		1,054.92
English, Robert O.	131		306.74
Falin, James T.	476		750.12
Farnsworth, Chas. R.	449		707.62
Farrell, J. R.	635		999.66
Fetters, H. C.	542		853.96
Filbin, Walter J.	198		311.72

Name	Hours of Overtime	Total
Fine, R. Norton	533	\$ 837.68
Fithian, Harold W.	375	590.86
Fletcher, D. B.	895	1,410.26
Fletcher, Jack	718	1,130.56
Follis, R. D.	819	1,289.88
Forsythe, John	119	187.80
Fortson, Native Roger	79	125.10
Foss, H. A.	533	838.90
Francis, W. D.	94	148.66
Frost, Stanley D.	217	341.46
Gadd, J. R.	499	785.88
Gaertner, G. H.	55	86.66
Gardner, R. L.	344	541.52
Gates, M. J.	22	33.90
Geesa, G. X.	565	890.34
Getz, Louis J.	275	433.82
Gibson, George W.	113	178.38
Gibson, Robert	390	613.86
Gilchrist, Wm. H.	765	1,204.98
Glenn, O. V.	804	1,266.34
Gorman, John F.	596	937.92
Grover, T. D.	116	182.36
Gump, Edward J.	289	455.94
Hahn, Ralph F.	356	560.98
Hall, Charles	659	1,037.76
Hanson, Andrew	620	977.10
Harr, Charles	369	581.68
Hatley, Guy	576	907.02
Heath, John L.	124	194.84
Henry, Wayne K.	556	875.34
Herauf, Peter J.	654	1,029.78
Hogan, D. B.	448	705.50
Hodges, Claude L.	1011	1,592.90
Holliday, Earl G.	600	944.44
Hopp, Lawrence E.	59	92.26
Hopp, Lester R.	19	29.48
Hovey, LeRoy B.	333	525.24
Hudson, M.	56	88.74
Hughet, Leo C.	146	230.40

Name	Hours of Overtime	Total
Inberg, C. C.	203	\$ 319.54
Jackson, C. H.	181	284.54
Jackson, Robert A.	225	354.80
Jasmann, J. K.	953	1,500.42
Jenkins, A.	596	938.08
Jensen, L. P.	82	129.34
Johnson, A. E.	418	658.18
Johnson, E. E.	436	786.14
Johnson, A. F.	151	237.66
Johnson, Roy	283	444.94
Johason, Kathryn M.	105	166.04
Judd, G. L.	531	835.88
Judd, S. T.	613	965.50
Kaliviet, Adaline M.	128	201.44
Kennedy, Tom	275	432.84
King, Thomas F.	100	157.66
Klaveano, G. W.	258	406.58
Klem, T. E.	206	324.06
Kleimenhagen, J. G.	685	1,079.24
Klema, Paul T.	56	87.74
Kluge, E. A.	755	1,188.80
Kolmer, R. C.	949	1,494.74
Krause, Geo. M.	409	644.32
Krouse, Clyde A.	469	738.32
Labrum, Theron L.	220	346.88
Landis, Fred	590	928.66
Larrance, Fred H.	598	941.88
Larson, Frank	513	492.24
Larson, Harry E.	474	746.68
Langa, Frank B.	420	661.36
Lawrenee, H. S.	578	910.72
Lawson, Albert C.	255	401.62
Laymon, LeRoy E.	181	285.54
Laymon, Roy	423	665.52
Leak, W. J.	613	964.98
Lennox, J.	551	867.68
Lillie, J. W.	307	483.60
Long, W. P.	29	45.60
Lovell, Charles E.	759	1,196.16

Name	Hours of Overtime	Total
Luebben, Harry D.	169	\$ 266.44
Mackey, E. L.	616	970.22
Markell, David H. Jr.	793	1,248.28
Mead, J. G.	504	793.96
Megale, D. V.	126	197.82
McClaire, Eldred M.	351	553.20
McGuire, Jessie J.	603	949.44
McMillen, F. M.	458	721.02
McKenna, J. F.	515	810.50
Mencer, Elmer F.	156	246.80
Mercer, Guy	397	625.08
Merrick, Mary R.	594	934.92
Messick, M. E.	6	9.02
Meyers, Charles J.	462	727.76
Monroe, James R.	664	1,046.38
Monteith, John Edmund	447	703.60
Morgan, John	847	1,333.72
Morton, Roberta D.	556	876.26
Mullan, Jack	694	1,092.66
Murrow, Roy H.	477	594.58
Moritz, Elmer	347	546.00
Nelson, Carl S.	764	1,203.52
Nelson, Christie	470	739.64
Nelson, J. K.	564	898.08
Nelson, Oscar	521	820.88
Newkirk, Fred	266	418.26
Newton, Thomas B.	56	87.96
Nihart, Harry D.	303	476.44
Norman, F. H.	532	837.90
Norton, Luther L.	191	300.52
Olson, L. V.	885	1,394.36
O'Rourke, J. F.	101	159.06
Orris, G. G.	241	380.16
Osmond, F. B.	204	320.60
Peterson, Roy H.	670	1,055.86
Phillips, Charles C.	236	371.96
Pickett, J. F.	100	156.94
Plaezek, Ambrose J.	258	405.70
Poindexter, C. M.	297	468.24

Name	Hours of Overtime	Total
Potts, O. J.	530	\$ 834.72
Price, Howard N.	84	131.88
Priebe, Wm.	828	1,303.62
Pugh, C. B.	673	1,060.38
Quimby, Dorothy M.	274	463.14
Rama, E. E.	306	482.98
Rankin, Mary M.	460	724.64
Ransom, D. E.	358	565.80
Reed, Eugene	22	35.64
Reiter, Leonard	506	797.34
Riley, R. F.	875	1,379.42
Roberts, P. G.	587	925.42
Rocks, J. E.	85	134.08
Rushton, D. D.	405	638.54
Schlatter, Ralph B.	60	94.62
Schlottman, A. C.	162	255.36
Schmidt, H. O.	579	912.52
Schmitz, J. N.	554	873.68
Seeley, H. A.	513	808.84
Shafer, Byron A.	106	166.62
Shafer, R. W.	370	582.40
Shilling, F. A.	351	553.64
Siewert, L. C.	257	406.08
Sinnott, T. O.	496	781.16
Simmons, Thos. G.	177	278.96
Snyder, Herbert F.	433	682.64
Stanley, A. K.	685	1,080.26
Stevenot, Charles A.	109	271.92
Stevens, Arthur A.	739	1,163.68
Stevenson, F. M.	908	1,430.36
Stewart, Raymond E.	468	737.86
Stokes, D. D.	928	1,460.98
Stone, P. B.	580	913.50
Stroud, T. J.	509	802.48
Swadberg, T. H.	836	1,316.86
Taylor, L. R.	516	813.14
Thompson, Albert W.	592	933.50
Thompson, L. K.	444	699.94
Thornton, Larry J.	505	795.66

Name	Hours of Overtime		Total
Toolan, George J.	251	\$	395.18
Trowbridge, Frank H.	456		717.56
Tracy, F. P.	140		221.12
Truman, Austin E.	186		295.72
Tschida, E. J.	428		675.34
Turner, G. W.	329		518.90
Tuttle, Harry F.	163		257.24
Underwood, W. J.	390		615.08
Unger, Carl D.	178		281.20
Van Meter, M. J.	89		139.68
Voss, Gilbert J.	644		1,014.94
Wall, Olin P.	329		519.38
Wallig, B. J.	251		395.34
Warren, M. D.	754		1,187.80
Waters, Franz E.	372		586.36
Weber, John	170		268.48
Wells, Cecil P.	245		387.16
White, Geo. O.	271		426.74
Wiederspan, John H.	178		280.40
Williams, Earl C.	287		452.94
Williams, W. L.	60		93.82
Wilson, J. E.	529		848.98
Wilson, J. W.	878		1,383.96
Wise, J. M.	821		1,294.30
Woolf, Lowel H.	559		881.56
Wray, Jean Davis	55		87.78
Yeo, Harold A.	456		718.44
Zako, Mike	483		760.30
Zerbe, G. M.	554		873.22
Zettle, Emmerich	558		880.34
Ziese, Herbert H.	634		999.58
Total.....			<hr/> \$168,504.08

State of Oregon,
County of Multnomah—ss.

Due service of the within Amended Complaint is hereby accepted in Multnomah County, Oregon, this 1st day of April, 1947, by receiving a copy thereof, duly certified as such by Donald S. Richardson of attorneys for Plaintiff.

RICHARD DEVERS,

Of Attorneys for Defendant.

[Endorsed]: Filed April 3, 1947. [9]

[Title of District Court and Cause.]

AMENDED ANSWER TO AMENDED
COMPLAINT

Defendant, Kaiser Company, Inc., based upon stipulation and order of Court, files its amended answer to plaintiff's amended complaint herein and admits, denies and alleges as follows:

I.

Answering paragraph II thereof, denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

II.

Answering paragraph III, defendant admits the following: it is, and at all times mentioned in said amended complaint was, a corporation organized and existing under the laws of the State of Nevada; during the period of time referred to in said complaint it was engaged in the construction and oper-

ation of a shipyard for the United States Maritime Commission, an agency of the United States of America, at Swan Island, in the City of Portland, State of Oregon, where it maintained an office in connection with such activities; said shipyard was located on property held under lease by the United States Maritime Commission and all of the facilities, materials, supplies and other properties used in connection with the construction, maintenance and operation of said shipyard were the property of the United States, and all vessels constructed at said shipyard were tankers constructed for and delivered to the United States within the State of Oregon; from approximately the 15th day of February, 1945, to the end of the period of time referred to in said amended complaint, to wit, May 1, 1946, defendant repaired certain vessels at said shipyard, all of such work being done under contract with the United States and its agencies and, so far as known to defendant, all of said vessels so repaired belonging to the United States; title to all materials, equipment, supplies and other property going into the construction of said vessels was at all times in the United States of America from the date of purchase and commencement of movement to said shipyard, approximately ninety per cent (90%) by value thereof being furnished to defendant by the United States of America; a substantial part of the materials, equipment, supplies and other property going into the construction of said vessels, both of that portion furnished by the Government and of that

portion procured by defendant, was manufactured or produced outside the State of Oregon and shipped to said shipyard on Government bills of lading, title thereto being in the Government, as aforesaid; the tankers constructed by defendant at said shipyard were contracted for by the United States of America and used in the prosecution of the war in which it was then engaged, and the vessels repaired at said shipyard were under the ownership or control of the United States of America in connection with the prosecution of said war and in connection with other Governmental purposes and uses; but the funds for the operation of said shipyard were those of defendant, being procured from its capital funds or from borrowings, but expenditures were reimbursed or allowed in cost under the terms of defendant's contracts with the Government; defendant furnished the organization, supervision, "know-how," and production methods for the conduct of said shipyard; but the construction, maintenance and operation of said shipyard by defendant was at all times under the direction, supervision and control of the United States of America, acting by and through the United States Maritime Commission. Except as herein expressly admitted, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

III.

Answering paragraph IV, defendant admits the following: in the period of time referred to in said paragraph, and in connection with the construction,

maintenance and operation of said shipyard as hereinabove in paragraph II expressly alleged, defendant engaged various persons as guards at said shipyard for the purpose of protecting property of the United States Government, the engagement of said persons by defendant being at all times subject to the direction, supervision and control of said Government, acting by and through the United States Maritime Commission, and said engagement by defendant being for the use and benefit of the United States Government. Except as herein expressly admitted, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

IV.

Answering paragraph V, defendant admits the following: At various times during the operation of said shipyard, as stated in paragraph II hereof, in the period of time referred to in the amended complaint, plaintiff and the other persons named in Exhibit A to said amended complaint were engaged as guards at said shipyard, as alleged in paragraph III hereof. Except as herein expressly admitted, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph. [12]

V.

Answering paragraph VI, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

VI.

Answering paragraph VII, defendant admits that plaintiff has employed Messrs. Green & Landye as his attorneys in connection with the above-entitled action; otherwise, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

VII.

Answering paragraph VIII, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

As and for a first, further, separate and distinct answer and defense to the amended complaint herein, defendant alleges:

I.

The rights of action set forth in the complaint are for trifling periods of time and sums due and are within the doctrine expressed in the legal maxim "de minimis non curat lex."

As and for a second, further, separate and distinct answer and defense to the amended complaint herein, defendant alleges:

I.

Defendant is, and at all times mentioned in said amended complaint was, a corporation organized and existing under the laws of the State of Nevada; during the period of time referred to in said complaint it was engaged in the construction and op-

eration of a shipyard for the United States Maritime Commission, an agency of the United States of America, at Swan Island, in the City of Portland, State of Oregon, where it maintained [13] an office in connection with such activities; said shipyard was located on property held under lease by the United States Maritime Commission and all of the facilities, materials, supplies, and other properties used in connection with the construction, maintenance and operation of said shipyard were the property of the United States, and all vessels constructed at said shipyard were tankers constructed for and delivered to the United States within the State of Oregon; from approximately the 15th day of February, 1945, to the end of the period of time referred to in said amended complaint, to wit, May 1, 1946, defendant repaired certain vessels at said shipyard, all of such work being done under contract with the United States and its agencies and, so far as known to defendant, all of said vessels so repaired belonging to the United States; title to all materials, equipment, supplies and other property going into the construction of said vessels was at all times in the United States of America from the date of purchase and commencement of movement to said shipyard, approximately ninety per cent (90%) by value thereof being furnished to defendant by the United States of America; a substantial part of the materials, equipment, supplies and other property going into the construction of said vessels, both of that portion

furnished by the Government and of that portion procured by defendant, was manufactured or produced outside the State of Oregon and shipped to said shipyard on Government bills of lading, title thereto being in the Government, as aforesaid; the tankers constructed by defendant at said shipyard were contracted for by the United States of America and used in the prosecution of the war in which it was then engaged, and the vessels repaired at said shipyard were under the ownership or control of the United States of America in connection with the prosecution of said war and in connection with other Governmental purposes and uses; but the funds [14] for the operation of said shipyard were those of defendant, being procured from its capital funds or from borrowings, but expenditures were reimbursed or allowed in cost under the terms of defendant's contracts with the Government; defendant furnished the organization, supervision, "know-how" and production methods for the conduct of said shipyard.

II.

By reason of the foregoing, the United States is the real party in interest and the true defendant in the above-entitled action and, by reason of not having consented to be sued in an action of the character and involving the amount set forth in the amended complaint herein, enjoys sovereign immunity from suit on the causes of action referred to in said amended complaint.

As and for a third, further, separate and distinct answer and defense to the amended complaint herein, defendant alleges:

I.

Defendant adopts and incorporates herein by reference the allegations set forth in paragraph I of its second affirmative defense.

II.

By reason of the foregoing the United States of America is in fact and in law the employer of plaintiff and the other persons named on Exhibit A of the amended complaint insofar as the activities referred to in said amended complaint are concerned; and inasmuch as the United States of America is excluded from the term "employer" as used in the Fair Labor Standards Act of 1938, plaintiff and said other persons are not entitled to the benefits of said Act and said Act is not applicable to them in connection with the matters referred to in the amended complaint. [15]

As and for a fourth, further, separate and distinct answer and defense to the amended complaint herein, defendant alleges:

I.

Defendant adopts and incorporates herein by reference the allegations set forth in paragraph I of its second affirmative defense.

II.

The foregoing activities of defendant were carried under cost-plus-a-fixed fee management con-

tracts or price-minus contracts with the United States Maritime Commission, all of which contracts were management contracts under which the principal function of defendant was to furnish managerial "know-how" for the construction, maintenance and operation of a shipyard belonging to the United States of America and under which the defendant was at all times subject to the direction, supervision and control of the United States of America in carrying on its sovereign function of prosecuting a war and procuring the necessary equipment, supplies and material necessary for such war prosecution.

III.

Such activities of the United States Government, and of defendant on its behalf and subject to its direction, supervision and control, do not constitute commerce within the meaning of the Fair Labor Standards Act of 1938.

As and for a fifth, further, separate and distinct answer and defense to the amended complaint herein, defendant alleges:

I.

Defendant adopts and incorporates herein by reference the allegations set forth in paragraph I of its second affirmative defense and paragraph II of its fourth affirmative defense. [16]

II.

The activities of defendant, as aforesaid, were as an instrumentality of the United States of America

and by reason thereof, as such instrumentality, defendant enjoys, in connection with the matters referred to in the amended complaint herein, sovereign immunity from suit on such matters.

As and for a sixth, further, separate and distinct answer and defense to the amended complaint herein, defendant alleges:

I.

The claims and causes of action referred to in the amended complaint herein arose prior to May 14, 1947, the date of the enactment of the Portal-to-Portal Act of 1947.

II.

The activities of plaintiff and the other persons named in Exhibit A of the amended complaint were and are not activities which were compensable by either:

- (a) An express provision of a written or non-written contract of employment in effect, at the time of such activities, between plaintiff and said other persons (or their agent or collective bargaining representative) and defendant; or
- (b) A custom or practice in effect, at the time of such activities, at the establishment and place of employment of plaintiff and said other persons, to wit, at Swan Island shipyard, covering such activities.

III.

By reason of the foregoing, under Section 2(a) of the Portal-to-Portal Act of 1947, defendant is not subject to any liability under the Fair Labor Standards Act of 1938, as amended, in connection with the matters referred to in the amended complaint herein.

As and for a seventh, further, separate and distinct answer and defense to the amended complaint herein, defendant alleges: [17]

I.

Defendant adopts and incorporates herein by reference the allegations set forth in paragraphs I and II of its sixth affirmative defense.

II.

By reason of the foregoing, under Section 2(d) of the Portal-to-Portal Act of 1947, this Court is without jurisdiction of this action and is without jurisdiction of each and every claim and cause of action referred to in the amended complaint herein.

As and for an eighth, further, separate and distinct answer and defense to the amended complaint herein, defendant alleges:

I.

The matters and claims referred to in the amended complaint herein relate to and are based on acts or omissions of defendant prior to May 14, 1947, the date of the enactment of the Portal-to-Portal Act of 1947, and relate to the failure of the defendant, as the alleged employer of plaintiff and

the other persons named in Exhibit A of the amended complaint, to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended.

II.

The acts or omissions of defendant complained of in said amended complaint herein were in good faith, in conformity with, and in reliance on administrative regulations, orders, rulings, approvals and interpretations of the United States Maritime Commission, an agency of the United States, and in conformity with and in reliance on administrative practices and enforcement policies of such agency, with respect to the class of employers to which defendant belonged. [18]

III.

By reason of the foregoing, pursuant to Section 9 of the Portal-to-Portal Act of 1947, defendant may not be subjected to any liability for or on account of the matters referred to in the amended complaint herein.

As and for a ninth, further, separate and distinct answer and defense to the amended complaint herein, defendant alleges:

I.

The acts or omissions of defendant referred to in the amended complaint herein and giving rise to the above-entitled action and the causes of action set forth in said amended complaint, were performed, committed, or omitted by defendant in good faith and with reasonable grounds for belief

that such acts or omissions were not a violation of the Fair Labor Standards Act of 1938, as amended.

II.

By reason of the foregoing, pursuant to Section 11 of the Portal-to-Portal Act of 1947, this court, in its sound discretion, should award no liquidated damages to plaintiff or any of the persons referred to and named in Exhibit A of the amended complaint.

Wherefore, defendant prays that plaintiff and the persons named in Exhibit A of the amended complaint herein take nothing, and that defendant may be hence dismissed with its costs.

RICHARD DEVERS,

GORDON JOHNSON,

Attorneys for Defendant.

Of Counsel.

HART, SPENCER, McCULLOCH &

ROCKWOOD,

THELEN, MARRIN, JOHNSON &

BRIDGES. [19]

State of Oregon,

County of Multnomah—ss.

Due service of the within Amended Answer to Amended Complaint is hereby accepted at Portland, Oregon, this 21st day of June, 1947, by receiving a copy thereof, duly certified to as such by Richard Devers of attorneys for defendant.

/s/ JAMES LANDYE,

Attorney for Plaintiff.

[Endorsed]: Filed June 24, 1947. [20]

[Title of District Court and Cause.]

REPLY

Come now the plaintiffs, leave of court being first duly had and obtained, and file this as their reply to the amended answer to the amended complaint, and admit, deny and allege:

I.

Deny paragraphs I, II, III, IV, V, VI and VII and the whole thereof, save and except as the same may have been specifically alleged, admitted or modified in plaintiffs' amended complaint or in this reply.

Replying to the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth further and separate and distinct answers and defenses to the amended complaint herein, plaintiffs deny each and every allegation and each and every paragraph therein contained and the whole thereof, save and except as the same may have been specifically alleged, admitted or modified in said amended complaint or in this reply.

For a first further and separate and distinct reply to the first further and separate and distinct answer to the amended complaint, plaintiffs allege that the times set forth in the amended complaint are not trifling periods, but, on the contrary, are composed of a minimum of thirty minutes per day. [21]

For a second separate and further reply, plaintiffs allege that said Act does not apply to plaintiffs in this particular case, in that the work involved in this particular case is not portal-to-portal work;

that, instead, the overtime asked for in this particular case is for work involving guards who had to stand roll call and inspection, receive orders and then go to their posts; that all of said activities consumed thirty minutes; that the employees, by written rule of the company, were required to be at the roll call and at the guard house thirty minutes before actually going to their posts of duty in the particular sections of the yard; that a guard was under the penalty of being fired or discharged if he did not so report for work at this particular time and stand roll call and inspection and have his assignments made; that all of said work and activities were work within the meaning of the Fair Labor Standards Act; that the Portal-to-Portal Act was not intended at any time to cut off or in any way bar suits of this kind and nature; that time is not asked for in this case from the time men reported on the premises, but, rather, it is asked for from the time they were required to report at the guard house under penalty of discharge if they did not do so, and said roll call, inspection and taking of assignments were part of the main activities of guarding said property.

As a third further and separate reply, particularly referring to the matters contained in the sixth, seventh, eighth and ninth further and separate and distinct answers, plaintiffs admit:

I.

That the claims and causes of action referred to in the amended complaint arose prior to May 14,

1947, the date of the enactment of the "Portal-to-Portal Act of 1947," but expressly deny each and every other allegation contained in said sixth, seventh, eighth and ninth affirmative answers; and plaintiffs allege that said Portal-to-Portal Act of 1947 is unconstitutional as applied to plaintiffs in this case, but particularly sections 2-a, 2-d 9 and 11 of said Act are unconstitutional; that these said causes of action are vested property rights [22] and were vested rights prior to the enactment of the Portal-to-Portal Act of May 14, 1947; that said Act is unconstitutional for the following reasons:

1. It is in violation of the due process clause of the fifth amendment to the Constitution of the United States, in that it seeks to retroactively take away property rights which were vested in the plaintiffs.
2. It is arbitrary and unreasonable, in that it sets up an unreasonable and arbitrary classification of depriving working people as a class of property rights retroactively.
3. Said act, and particularly the sections and subsections above mentioned, are further violative of the due process clause in that said sections, and each of them, impair the obligation of contract in violation of the due process clause of the fifth amendment to the Constitution of the United States; that, particularly section 2-d of said act, although attempting to be written procedurally in terms, actually cuts off all rights of the plaintiffs in both

federal and state courts, and despite the wording of said section 2-d, which is attempting to be procedural in character, actually cuts off and deprives plaintiffs of vested rights under the due process clause of the fifth amendment to the Constitution of the United States.

4. That if the said sections referred to above are construed to apply to plaintiffs in this case, then these said sections are unconstitutional for the reason that the title of said Act is fraudulent, misleading and deceiving and, therefore, deprives plaintiffs in this case of their property without due process of law, in violation of the due process clause of the fifth amendment to the Constitution of the United States; that this is particularly true because plaintiffs in this case were guards who were required to report to work under penalty of discharge, as set forth in the second separate and further reply, and there is no element of portal-to-portal activity involved in this case.

II.

That, furthermore, sections 2-d, 9 and 11 of said Portal-to-Portal Act are unconstitutional in that these sections violate Article III, sections 1 and 2, of the Constitution of the United States, in that said Act and sections of [23] said act, as stated above, encroach and invade the domain of the judiciary, for the reason that these said sections have attempted to take judicial construction of past acts and past causes of action and to put a congressional

interpretation on said Fair Labor Standards Act of 1938, and by said method have invaded the field of the judiciary, in violation of Article III, sections 1 and 2; further, and particularly applying section 2-d of said Act, said section, although written procedurally in terms, in fact cuts off all rights, leaving no remedy of any kind to plaintiffs, and by such method has denied the court its proper function as a judiciary; further, section 9 is unconstitutional in that it encroaches upon the power of the judiciary, as set forth in Article III, sections 1 and 2, of the Constitution of the United States, in that said section 9 purports to allow a defendant and an administrative branch or agency of the executive arm of the government to interpret said law, rather than the judiciary.

Wherefore, plaintiffs pray for judgment as set forth in the amended complaint and that the court declare unconstitutional sections 2-a, 2-d, 9 and 11 of said Portal-to-Portal Act of 1947.

GREEN & LANDYE,

Attorneys for Plaintiffs.

Service of the foregoing reply is hereby accepted this 3rd day of July, 1947.

/s/ RICHARD DEVERS,

Of Attorneys for Defendant.

[Endorsed]: Filed July 3, 1947. [24]

[Title of District Court and Cause.]

MOTION OF THE UNITED STATES TO INTERVENE AND FOR TIME WITHIN WHICH TO FILE BRIEF IN SUPPORT OF THE CONSTITUTIONALITY OF THE PORTAL-TO-PORTAL ACT OF 1947

Now comes the United States of America, by its Attorney General, and pursuant to the Act of August 24, 1937 (c. 754, sec. 1, 50 Stat. 751, 28 U.S.C. § 401), moves to intervene and become a party to this action for the purposes and with all the rights provided by said Act of August 24, 1937, upon the ground that the constitutionality of the Portal-to-Portal Act of 1947, approved May 14, 1947, has been drawn in question in this action, and neither the United States nor any agency thereof, nor any officer or employee thereof, as such officer or employee, is a party hereto.

The United States further moves that the Court receive its pleading, entitled "Pleading of the United States in Intervention," which accompanies this motion in accordance with Rule 24(c) of the Federal Rules of Civil Procedure, as its appearance in this action in support of the constitutionality of the said Portal-to-Portal Act of 1947, and in opposition to all pleadings, motions, and proceedings of any of the parties hereto, denying the validity of the said Act, or any part thereof, upon the ground that it is unconstitutional. [25]

The United States moves also for leave to file a brief in support of the constitutionality of the

said Portal-to-Portal Act of 1947, within 30 days after service upon it of plaintiff's brief on the constitutional issue or such other time as the Court may deem reasonable.

TOM C. CLARK,
Attorney General.

By /s/ PEYTON FORD,
Assistant Attorney General.

/s/ HENRY L. HESS,
United States Attorney.

Of Counsel:

ENOCH E. ELLISON,
Special Assistant to the Attorney General.

JOHANNA M. D'AMICO,
Attorney, Department of Justice.

[Endorsed]: Filed August 19, 1947. [26]

[Title of District Court and Cause.]

ORDER

This matter having come on regularly for hearing on the 8th day of September, 1947, on the motion of the United States of America to intervene and for time within which to file brief in support of the constitutionality of the Portal-to-Portal Act of 1947 before the above-entitled Court, the Honorable Claude McCulloch, United States District Judge, James Landye, Esq. (of Messrs. Green & Landye)

appearing on behalf of the plaintiff, Richard Devers, Esq. (of Messrs. Hart, Spencer, McCulloch & Rockwood), appearing on behalf of the defendant, and Henry L. Hess, United States Attorney for the District of Oregon, appearing on behalf of the United States of America; and

It Appearing to the Court and the Court finds that the constitutionality of the Portal-to-Portal Act of 1947, approved May 14, 1947, has been drawn in question in this action, and neither the United States of America nor any agency thereof, nor any officer or employee thereof, as such officer or employee, is a party thereto.

It Is Hereby Ordered that the said petitioner, the United States of America, be and it is hereby granted leave to intervene in this action herein and that said petitioner is hereby granted leave to file its pleading of the United States of America in intervention, and the Clerk of this Court is hereby ordered to file immediately said pleading which was tendered with said motion to intervene.

The Court having heretofore held the Portal-to-Portal Act of 1947, approved May 14, 1947, to be constitutional as applied to this case, the United States of America waived the provisions of said motion relative to time in this Court within which to file a brief upon the constitutionality of the Portal-to-Portal [27] Act of 1947;

It Is, Therefore, Further Ordered that no time be granted for the filing of a brief on the part of the United States of America as to the constitutionality of said Act.

Done in open court this 8th day of September, 1947.

CLAUDE McCULLOCH,

United States District Judge.

[Endorsed]: Filed September 10, 1947. [28]

[Title of District Court and Cause.]

PLEADING OF THE UNITED STATES
IN INTERVENTION

The United States of America, intervenor herein, for its pleading in intervention says:

1. That intervenor is not required to answer the factual allegations of the parties to this action and, therefore, neither admits nor denies such allegations.
2. That the Portal-to-Portal Act of 1947, approved May 14, 1947, conforms in all respects to the provisions and requirements of the Constitution of the United States and is an existing and valid law of the United States.
3. That the constitutionality of the said Portal-to-Portal Act of 1947 is not subject to serious question but if the Court should entertain serious doubts concerning the constitutionality of that Act, it should first consider the defenses raised by the defendant which are not based upon the Portal-to-Portal Act of 1947, and, if it finds that any such defense or defenses bar all the claims herein, it should dismiss the action without ruling on the constitutional question. [29]

Wherefore, the United States of America prays that the Court enter a judgment herein which shall be consistent with the constitutional validity of the said Portal-to-Portal Act of 1947.

TOM C. CLARK,

By /s/ PEYTON FORD,

Assistant Attorney General.

/s/ HENRY L. HESS,

United States Attorney.

Of Counsel:

ENOCH E. ELLISON,

Special Assistant to the Attorney General,

JOHANNA M. D'AMICO,

Attorney, Department of Justice.

[Endorsed]: Filed September 10, 1947. [30]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

I think the facts of this case bring it within the Portal-to-Portal Act. I have previously held that the part of the Act withdrawing jurisdiction was constitutional.

The case will therefore be dismissed for want of jurisdiction.

Dated this 21st day of January, 1948.

CLAUDE McCOLLOCH,

Judge.

[Endorsed]: Filed January 21, 1948. [31]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on for trial before the above entitled Court, Honorable Claude McCulloch, United States District Judge, presiding, on the 25th day of June, 1947, James Landye, Esq. (of Messrs. Green and Landye), appearing on behalf of the plaintiffs, and Richard Devers, Esq. (of Messrs. Hart, Spencer, McCulloch and Rockwood), and Gordon Johnson, Esq. (of Messrs. Thelen, Marrin, Johnson & Bridges), appearing on behalf of the defendant.

Evidence both oral and written and the stipulation of the parties having been submitted and the defendant having moved the Court to dismiss the action upon the ground that on the facts and the law the plaintiffs have shown no right to relief for the reason that under Section 2(a) of the Portal-to-Portal Act of 1947 no liability exists on the part of the defendant to the plaintiffs, or any of them, and for the further reason that under Section 2(d) of the Portal-to-Portal Act of 1947 the Court is without jurisdiction over the claims involved in this case, and the Court having considered the evidence and the stipulations of the parties, finds the facts and states the conclusions of law on the jurisdictional issue as follows:

FINDINGS OF FACT

1. That this action was brought to recover from defendant unpaid overtime compensation and an additional amount equal to the amount of such unpaid overtime compensation as liquidated damages, pursuant to the Fair Labor Standards Act of 1938 (29 U. S. C. A., sections 201-219, inclusive), hereinafter referred to as the Act. [32]

2. In the period from February 1, 1942, to March 4, 1945, plaintiffs served as guards at the shipyard operated by defendant for the United States of America, acting by and through the United States Maritime Commission, which shipyard was located at Swan Island, in the City of Portland, State of Oregon.

That the plaintiffs were required to report for roll call at the guardhouse 30 minutes prior to relieving the shift on duty; that, during this said 30 minutes, plaintiffs were required to stand roll call, inspection, receive assignments, and to proceed to their posts of duty which were varying distances from the guardhouse; that the said guardhouse was located on the property inside the gate at Swan Island; that the plaintiffs worked 30 minutes per day during the period above mentioned, namely from February 1, 1942, to March 4, 1945, six days a week, without receiving overtime compensation; that the plaintiffs were not only required to report 30 minutes prior to the time on the premises of the employer but were disciplined for failure to do so.

3. The hours of overtime for which plaintiffs seek compensation by their complaint herein relate

to activities which were preliminary to or postliminary to the principal activity of plaintiffs as aforesaid, namely, guarding said shipyard; and plaintiffs have been paid in full for all services performed by them in the performance of said principal activity.

4. Neither the United States of America, the United States Maritime Commission, nor defendant, agreed or contracted, in writing or otherwise, with plaintiffs or any of them, either directly or through any agent or collective bargaining representative of them or any of them, to make compensable the time spent by plaintiffs or any of them in activities preliminary or postliminary to their principal activity, to wit, guarding said shipyard. The only contract, written or otherwise, between plaintiffs or any of them and defendant, the United States of America, or the United States Maritime Commission with respect to employment at said [33] shipyard was that plaintiffs and each of them would be compensated and paid for the time spent by them in actually guarding said shipyard, as distinguished from any preliminary or postliminary activities in connection therewith. Said contract has been fully performed and plaintiffs and each of them have been fully paid and compensated for the time spent in actually guarding said shipyard; and, in fact, none of the plaintiffs contend or assert that such contract has not been fully performed.

5. During the period referred to above in which plaintiffs performed services as guards at said shipyard, there was not in effect there any practice,

custom or usage under which guards or any other employees at said shipyard were compensated or paid for time spent before or after the performance of their principal activities, guarding said shipyard. Neither the United States of America, the United States Maritime Commission, nor the defendant, had ever, in said period, compensated or paid guards at said shipyard for reporting time, time spent in preparation for duty, time spent in roll call, time spent in assignments to post or receipt of instructions, time spent going to or from posts of duty, or time spent checking out. The practice, custom and usage at said shipyard in said period with respect to computing time worked by guards was to allow for and count only the time actually spent by the guards, including the plaintiffs, at their posts of duty and while guarding said shipyard.

CONCLUSIONS OF LAW

1. That the Court has jurisdiction of the parties.
2. There was no express provision of a written or non-written contract in effect, at the time plaintiffs served as guards at said shipyard, between plaintiffs or their agents or collective bargaining representative and defendant or the United States of America or the United States Maritime Commission pursuant to which the preliminary and postliminary activities referred to above and the time spent in performing the same were [34] compensable, either with respect to straight-time compensation, or overtime compensation.

3. There was not in effect, at the time plaintiffs served as guards as hereinbefore referred to, a custom or practice at said shipyard where said services were performed, covering said preliminary or postliminary activities, and not inconsistent with a written or nonwritten contract in effect as such time between plaintiffs and defendant, the United States of America or the Maritime Commission, under which said preliminary and postliminary activities were compensable, either by way of straight-time or overtime compensation.

4. That under the provisions of Section 2(d) of the Portal-to-Portal Act of 1947 this Court has no jurisdiction over this action, for the reason that it is an action to enforce liability for or on account of the failure of the alleged employer of plaintiffs to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended, with respect to an activity which was not compensable under Section 2(a) or Section 2(b) of the Portal-to-Portal Act of 1947.

5. The case should be dismissed for want of jurisdiction.

Dated this 21st day of January, 1948.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed January 21, 1948. [35]

In the District Court of the United States
for the District of Oregon

Civil No. 3030

C. T. POTTER,

Plaintiff,

vs.

KAISER COMPANY, INC., a corporation,

Defendant.

JUDGMENT DISMISSING ACTION FOR
WANT OF JURISDICTION

This action came on for trial before the above entitled Court, Honorable Claude McCulloch, United States District Judge, presiding, on the 25th day of June, 1947, James Landye, Esq. (of Messrs. Green and Landye), appearing on behalf of the plaintiffs and Richard Devers, Esq. (of Messrs. Hart, Spencer, McCulloch and Rockwood), and Gordon Johnson (of Messrs. Thelen, Marrin, Johnson & Bridges), appearing on behalf of the defendant.

Evidence both oral and written having been submitted and stipulations made, and the defendant having moved the Court to dismiss the action upon the ground that on the facts and the law the plaintiffs have shown no right to relief, for the reason that under Section 2(a) of the Portal-to-Portal Act of 1947, no liability exists on the part of the defendant to the plaintiffs, or any of them, and for the further reason that under Section 2(d) of the

Portal-to-Portal Act of 1947, the Court is without jurisdiction over the claims involved in this case, and the Court being advised:

It Is Ordered and Adjudged that this action, and each and every claim involved therein, be dismissed for want of jurisdiction.

Costs to neither party.

Dated this 21st day of January, 1948.

CLAUDE McCOLLOCH,
Judge.

Judgment entered in docket January 21, 1948.

[Endorsed]: Filed January 21, 1948. [36]

In the District Court of the United States
for the District of Oregon

Civil No. 3030

C. T. POTTER, et al.,

Plaintiffs,

vs.

KAISER COMPANY, INC., a corporation,

Defendant,

THE UNITED STATES OF AMERICA,

Intervenor.

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs, and each of them, hereby appeal to the Circuit Court of Appeals, Ninth Circuit, from that final judgment,

and from the whole thereof, entered herein on January 21, 1948, under which the Court dismissed said cause for lack of jurisdiction.

Dated: this 13th day of February, 1948.

GREEN, LANDYE &
PETERSON,
/s/ JAMES LANDYE,
Attorneys for Plaintiffs.

[Endorsed]: Filed February 16, 1948. [37]

Fidelity and Deposit Company of Maryland,
Baltimore
4915674

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas, C. T. Potter, et al., plaintiffs in the above entitled action, appeal to the Circuit Court of Appeals from a judgment made and entered against said plaintiffs on January 21st, 1948,

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and empowered to become surety upon bonds, undertakings. etc., does hereby undertake and promise, on the part of the appellant, that said appellant will pay all costs in a sum not exceeding Two Hundred Fifty and No/100ths Dollars (\$250.00), if the appeal is dismissed or the

judgment affirmed, or of such costs as the appellate court may award if the judgment is modified.

[Seal]

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
By CLARENCE D. PORTER,
Attorney in Fact.

Countersigned:

CLARENCE D. PORTER,
Resident Agent.

[Endorsed]: Filed Feb. 16, 1948. [38]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
PLAINTIFFS-APPELLANT INTEND TO
RELY ON APPEAL

Come now the plaintiffs-appellant and each of them herein, and make this, their statement of points upon which they intend to rely on appeal of this case to The United State Circuit Court of Appeals for the Ninth Circuit:

1. That the Portal-to-Portal Act of 1947 and each provision and part of said Act has no application to the facts in this case.
2. If the Portal-to-Portal Act has application to the facts in this case, that said Act is unconstitutional; that particularly the provisions of Sections 2-A, 2-D, 9 and 11 of said Act are unconstitutional as applied to these plaintiffs-appellant in that said provisions of said Act violate the Due Process Clause of the Fifth Amendment of the Constitution of the United

States and violate Article III, Sections 1 and 2, of the Constitution of the United States.

Dated: this 18th day of March, 1948.

GREEN, LANDYE &
PETERSON,

By /s/ JAMES LANDYE,

Attorneys for Plaintiff-
Appellant.

Service Accepted 3/18/48.

E. B. TWINING,
Asst. U. S. Atty.

Service Accepted 3/18/48.

RICHARD DEVERS,
Of Attys. for Defendant.

[Endorsed]: Filed March 18, 1948. [39]

[Title of District Court and Cause.]

**PLAINTIFFS-APPELLANTS' DESIGNATION
OF RECORD ON APPEAL**

Come now plaintiffs-appellants in the above entitled case and designate the record desired on appeal, as follows:

1. Amended complaint.
2. Amended answer to amended complaint.
3. Reply.
4. Motion of U. S. to intervene.
5. Order of intervention of U. S.
6. Pleading of U. S. in intervention.
7. Memorandum of decision.
8. Findings of fact and conclusions of law.
9. Judgment of dismissal.
10. Notice of appeal.
11. Appeal bond.

12. Entire stenographic transcript.
13. Exhibit 31, photostat copy.
14. Plaintiffs-appellants' statement of points on appeal.
15. Designation of record on appeal.
16. Docket entries.

Dated this 17th day of March, 1948.

JIM LANDYE,
GREEN, LANDYE &
PETERSON

Attorneys for Plaintiffs-
Appellants.

[Endorsed]: Filed March 18, 1948. [40]

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF RECORD ON APPEAL

The appellee, Kaiser Company, Inc., hereby designates the following additional portions of the record and proceedings in this case to be contained in the in the Record on Appeal:

1. Summons.
2. Appellee's designation of additional portions of Record on Appeal.

GORDON JOHNSON,
THELEN, MARRIN,
JOHNSON & BRIDGES,
RICHARD DEVERS,
HART, SPENCER,
McCULLOCH & ROCKWOOD,
Attorneys for appellee
Kaiser Company, Inc.

State of Oregon,
County of Multnomah—ss.

Due service of the within Appellee's Designation of Additional portions of Record on Appeal is hereby accepted at Portland, Oregon, this 26th day of March, 1948, by receiving a copy thereof, duly certified to as such by Richard Devers of attorneys for Appellee.

GREEN, LANDYE &
PETERSON,
JAMES LANDYE,
Attorney for Appellants.

HENRY L. HESS,
United States Attorney,
of Attorneys for Intervenor.

[Endorsed]: Filed March 26, 1948. [41]

Service of the foregoing plaintiffs-appellants' designation of record on appeal is hereby accepted this 18th day of March, 1948.

/s/ RICHARD DEVERS,
Of Attorneys for
Defendants-Respondents.

HENRY L. HESS,
U. S. Attorney for the
District of Oregon.

By /s/ EDWARD B. TWINING,
Of Attorneys for Intervenor.

[Title of District Court and Cause.]

DOCKET ENTRIES

1946

Jan. 17—Filed Complaint.

Jan. 17—Issued summons—to Marshal.

Jan. 24—Filed summons with return.

Feb. 14—Filed motion for additional time to plead.

Feb. 14—Filed and entered order granting additional time to answer or otherwise plead.
Fee.

Mar. 12—Answer of Defendant.

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Feb. 4—Filed plaintiffs' interrogatories.

Feb. 14—Filed stipulation for order extending time to answer plaintiffs' interrogatories to March 19.

Feb. 14—Filed and entered order extending time to answer plaintiffs' interrogatories to March 19, McC.

Mar. 15—Entered order setting for pre-trial on March 24, 1947 notified, McC.

Mar. 20—Filed stipulation for order extending to April 9, 1947, to answer plaintiffs' interrogatories. McC.

Mar. 20—Filed and entered order extending to April 9, 1947, to answer plaintiffs' interrogatories. McC.

Mar. 24—Entered record of pre-trial conference.

Mar. 26—Memorandum following pre-trial filed in Civ. 3008 which see.

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- Apr. 3—Filed stipulation for order to file amended complaint.
- Apr. 3—Filed and entered order to file amended complaint. McC.
- Apr. 3—Filed Amended Complaint.
- Apr. 7—Entered order setting for trial on issue of liability on June 3, 1947 notified. McC.
- Apr. 9—Filed Defendant's objections to Plaintiffs' Interrogatories.
- Apr. 9—Filed stipulation for order allowing to May 1, 1947, for defendant to answer or plead.
- Apr. 9—Filed and entered order allowing to May 1, 1947, for defendant to answer or plead. McC.
- Apr. 30—Filed stipulation for additional time to answer or plead.
- Apr. 30—Filed and entered order allowing defendant to May 12 to plead. Driver.
- May 12—Filed stipulation for order allowing to May 22, 1947, for defendant to answer or plead.
- May 12—Filed and entered order allowing to May 22, 1947, for defendant to answer or plead. McC.
- May 15—Entered order resetting for trial on June 12, 1947, notified. McC.
- May 22—Filed Answer to Amended Complaint.
- June 6—Entered order resetting for trial on June 24, 1947. McC.
- June 24—Filed stipulation for order allowing defendant to file amended answer.

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- June 24—Filed and entered order allowing defendant to file amended answer. McC.
- June 24—Filed stipulation for order allowing plaintiffs 10 days to file reply.
- June 24—Filed and entered order allowing plaintiff 10 days to file reply. McC.
- June 24—Filed amended answer to amended complaint.
- June 24—Record of trial before court. McC.
- June 25—Record of trial before court. McC.
- June 26—Record of trial before court. McC.
- June 26—Filed bundle of card assignments.
- June 30—Filed trial exhibits 1 to 31 inclusive excepting 3.
- July 3—Filed reply to the amended answer.
- July 21—Mailed Judge McCulloch's certificate with copies pleadings to Atty. General.
- July 31—Filed 14 additional card assignments.
- Aug. 19—Filed motion of U. S. Atty. for leave to intervene, and for order to file pleading of U. S. in intervention.
- Sept. 5—(Filed and entered order consolidating Civ. 3269 Verberg v. Kaiser Co. and that all further entries be made in this Civ. 3030 case). McC.
- Sept. 8—Entered order allowing intervention of United States. McC.
- Sept. 10—Filed order allowing intervention of United States. McC.
- Sept. 10—Filed pleading of United States in intervention. [43]

1947

- Nov. 10—Filed stipulation for amended order consolidating causes Civ. 3399 and 3030.
- Nov. 10—Filed motion for amended order consolidating causes Civ. 3399 and 3030.
- Nov. 17—Entered order resetting for hearing on Nov. 18, 1947, 1:30 p.m., defendant's Findings, Conclusions and Motion to Dismiss. McC.
- Nov. 18—Record of hearing on motion to amend Findings of Fact and Conclusions of Law and settlement of same; and order continuing to further order.
- Dec. 26—Filed Transcript of Proceedings June 24-26/1947.
- Dec. 26—Filed Copy Transcript of Proceedings, June 24-26/1947.

1948

- Jan. 2—Entered order setting for Jan. 12, 1948, 2 p.m., for settlement of Findings and Conclusions—McC. notices.
- Jan. 12—Record of hearing in settlement of Findings—argued—reserved. McC.
- Jan. 21—Filed memorandum of decision. McC.
- Jan. 21—Filed and entered Findings of Fact and Conclusions of Law. McC.
- Jan. 21—Filed and entered Judgment dismissing action for want of jurisdiction. McC.
- Feb. 16—Filed notice of appeal by plaintiffs.
- Feb. 16—Filed bond for costs on appeal.
- Feb. 16—Mailed copies notice of appeal to Henry L. Hess, and Hart, Spencer, McC. & R.

1948

- Mar. 16—Filed stipulation for order allowing appellant to and including May 1, 1948, to file and docket appeal.
- Mar. 16—Filed and entered order allowing appellant to and including May 1, 1948, to file and docket appeal. McC.
- Mar. 18—Filed designation of record on appeal.
- Mar. 18—Filed statement of points to rely on appeal.
- Mar. 26—Filed appellee's designation of additional portions of record on appeal.
- Mar. 31—Filed and entered order to forward photostatic copies of Exhibit 31 to C.C.A. McC. [44]

United States of America,
District of Oregon—ss.

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 46 inclusive constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 3030, in which C. T. Potter is Plaintiff and Appellant, and Kaiser Company, Inc., a corporation, is defendant and Appellee; that the said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant,

and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file in my office and in my custody.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony of June 24-26, 1947, taken and filed in this office in this cause, together with photostat copy of exhibit No. 31 filed in this cause.

I further certify that the cost of comparing and certifying the within transcript is \$32.00, and the cost of filing notice of appeal is \$5.00, making a total of \$37.00, and that the same has been paid by the said appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 31st day of March, 1948.

[Seal] LOWELL MUNDORFF,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy. [46]

In the District Court of the United States
for the District of Oregon

Before: Honorable Claude McCulloch,
Judge.

Civil No. 3030

C. T. POTTER,

Plaintiff,

vs.

KAISER COMPANY, INC., a corporation,
Defendant.

Portland, Oregon, June 24, 1947

Appearances:

Mr. James Landye (Green & Landye), of Attorneys for Plaintiff.

Mr. Richard Devers (Hart, Spencer, McCulloch & Rockwood) and Mr. Gordon Johnson (Thelen, Marrin, Johnson & Bridges) of Attorneys for Defendant.

Mr. Henry L. Hess, United States Attorney.

TRANSCRIPT OF PROCEEDINGS

* * * * *

Plaintiff's Testimony

COLLYER T. POTTER

one of the plaintiffs herein, was thereupon produced as a witness and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Landye:

Q. Your name is Collyer T. Potter?

A. Yes.

(Testimony of Collyer T. Potter.)

Q. You are a plaintiff in this case, is that correct? A. Yes.

Q. Where do you live?

A. 2945 North Willamette Boulevard.

Q. How long have you lived there?

A. I have lived at that particular address about six years now.

Q. Have you lived in Oregon most of your life?

A. Yes, I have.

Q. When did you first go to work, if you recall, for the Kaiser Company, Inc., at Swan Island, if you remember?

A. I believe it was May 5, 1942.

Q. What was your job? A. Guard.

Q. As a guard? A. Yes.

Q. Then when did you leave that employment, Mr. Potter?

A. I think it was March, 1945, I believe [128*]

Q. March of 1945? A. Yes.

Q. What was your rank, whatever you want to call it, when you first went to work there?

A. Well, I suppose it would be comparable to a private in the Army.

Q. You were just an ordinary guard, is that correct?

A. Yes, that is right, just an ordinary guard.

Q. Then, later on, were you promoted?

A. Sergeant.

Q. Then, later on, you became a lieutenant, is that correct? A. That is right.

* Page numbering appearing at top of page of Reporter's certified Transcript of Record

(Testimony of Collyer T. Potter.)

Q. In this case, to make the record clear, you are not claiming any overtime compensation from the time you were a lieutenant, is that correct?

A. That is right.

Q. That is the time you were second in command? A. That is right.

Q. Down at the Swan Island Yard, where is the guardhouse, the place that they assemble, where the guards assemble?

A. I would say it is down about a half mile from the entrance to the yard on what we call the outfitting basin. It would be on the east side of Swan Island proper.

Q. Tell the Court, what time did you report for work?

Mr. Johnson: Just a minute. I want to object to that on [129] the ground it calls for an opinion.

Mr. Landye: I withdraw the question.

Q. Tell us in just a few of your own words what you would do, what time you would get there, when you went on shift and so forth?

A. What time?

Q. Yes. What time and just exactly what you would do?

A. From the time we arrived at the guardhouse?

Q. Yes. What would you do?

A. We were required to put on our uniforms and get ready for roll call.

Q. What time would roll call be?

A. Usually a half hour before we went on duty. We had to be there a half hour before we went on duty.

(Testimony of Collyer T. Potter.)

Q. What did you do at roll call?

A. Well, we had inspection and reading of orders and assignment of the men to the various posts in the yard, and instructions to the guards.

Q. Instructions to the guards?

A. That is right.

Q. How long would that take?

A. I would say it would probably average about ten minutes.

Q. About ten minutes? A. Yes.

Q. Then, what happened after that?

A. After that, the men were to march to various posts in the [130] yard.

Q. When you say "march," did you walk or go down in formation?

A. No, we walked, very definitely walked there.

Q. Did you march? Go in military formation, in squads or whatever you call it?

A. That is right.

Q. Then what happened?

A. Then the men would be assigned to various posts in the yard.

Q. You arrived at your posts, then, a half hour later, is that correct? A half hour from the time you first had your roll call?

A. Well, yes, it would depend on the distance it is from the guardhouse. It might approximate a half hour.

The Court: Maybe he meant he had to be there a half hour before roll call. A half hour before what? He has not made that clear. He said he was required to be there a half hour before what? Before what?

(Testimony of Collyer T. Potter.)

Q. (By Mr. Landye): You say were were required to be there a half hour—you were required to be there for roll call a half hour before——

The Court: No. He said he was required to be there a half hour before what?

A. Before roll call.

The Court: Take your time.

Q. (By Mr. Landye): Let us go back a minute. Let us take a shift. Suppose you had to actually start guarding a particular ship at 4:30, we will say, in the afternoon. A. Yes.

Q. What time did you have to be in the guard-house for roll call?

Mr. Johnson: Just a minute. I want to object to that question on the ground that there is no question of a hypothesis involved at all. Let us find out what shift this witness was working on and when he came and then we will know what the facts are.

Mr. Landye: All right.

Q. What time, for instance, did your shift start?

A. Well, for instance, if we were required to go on duty at 4:30——

Q. Yes. A. ——we would be——

Mr. Johnson: Just a minute. I want to object to this on the ground it is not responsive. He is not being asked a hypothetical question but a factual question.

The Court: Go ahead.

(Testimony of Collyer T. Potter.)

Q. (By Mr. Landye): Go ahead.

A. Our hours were different. Assuming we had to go on duty at 4:30, well——

The Court: We just want to get the facts.

A. ——we were required to be there at 4:00 o'clock.

The Court: What would the name of that shift be, beginning at 4:30? [132]

Q. (By Mr. Landye): Would that be the swing shift? A. That would be the swing shift.

The Court: Assuming that the swing shift began at 4:30, what time would you have to be at the guardhouse? A. 4:00 o'clock.

Q. (By Mr. Landye): Then, at 4:00 o'clock is when they started the roll call, is that correct?

A. That is right.

Q. Would it be between 4:00 and 4:30 you were talking about that you would have roll call, inspection, assignment to shifts and march to your posts, is that correct? A. That is right.

Q. That would take up the half hour?

A. Yes.

Q. That guardhouse, where you have to have roll call, is that located on the Kaiser premises?

A. Yes.

Q. At Swan Island? A. Yes.

Q. You were a lieutenant of the guards, is that correct? A. Yes.

Q. I want to ask you, Mr. Potter, if you have ever discharged a man for not reporting a half hour before he actually had to be at his post, or recommended his discharge?

(Testimony of Collyer T. Potter.)

A. Well, yes. What we lieutenants did there was, usually speaking, [133] to refer it to the chief. As a general rule, he supported our decision and if we recommended a man be discharged for some dereliction in duty or failure to report, for instance, he would usually sustain it and he was discharged.

Q. Where you have so recommended as a lieutenant, was a single man discharged for not being there at 4:00 o'clock——

A. Very definitely, yes.

Q. ——for roll call?

A. That is right.

Q. In connection with that, was there a series of instructions that were sent out and given to the various guards, while you were working down there?

A. That is right.

Mr. Landye: May I have this folder marked for identification?

(Folder containing instructions to guards thereupon marked Plaintiff's Identification No. 31.)

Q. Showing you Plaintiff's Identification 31, I will ask you what that is, sir?

The Court: Tell me what it is. You know what it is.

A. We got numerous——

The Court: You just tell me.

Mr. Landye: Contained in Plaintiff's Identification No. 31 are numerous bulletins, one of which is issued by Mr. Utley, Chief of the Guards, dated

(Testimony of Collyer T. Potter.)

March 11, 1945, sent to three lieutenants and various sergeants, giving certain instructions concerning guards' behavior.

Beginning on the next page is Part 1 of General Instructions, and that continues for quite a number of pages, and the point particularly I wish to draw the Court's attention to is that language under 4, "Deportment," which states: "All members should be prepared to stand roll call thirty minutes prior to relieving the shift on duty. They shall report at Guard Headquarters before going on duty and at the expiration of their tour of duty. Each member will see that a complete and detailed report is submitted as to all activities occurring during that period."

They were required by this rule to be there thirty minutes early for roll call before they actually took up their posts.

The Court: What did they do at the end of the shift?

Mr. Landye: Then, at the end of the shifts, it says here that they were to sit down and make out various reports as to all activities. The time that we are talking about, that is in controversy here, is this half hour's time——

The Court: Before?

Mr. Landye: Yes, a half hour before.

The Court: You do not have—you do not think you have any claim at the end of the shift?

Mr. Landye: I think perhaps there is a claim, but we are limiting the showing to merely for thirty

(Testimony of Collyer T. Potter.)

minutes before actually [135] going to work, or to the thirty minutes for roll call. They were required to be there or be fired.

Q. There is also attached to that a letter or bulletin, later on in this file, dated March 24, 1944, in which Captain Utley again sends out certain instructions and he says, on page 4: "Beginning next Monday, if I see a man in roll call without his Sam Brown belt (those that have them); without full uniform, or who is not cleanly shaven, I am going to send that man home to clean up or to put on the rest of his uniform. There will be frequent inspections at roll call. They will not be announced." Then he tells of the various things he is going to come down to do.

The Court: That all seems proper enough, what you have read there.

Mr. Landye: If we are paid for it, it is proper enough. It is this half hour we are talking about and objecting to.

The Court: Do you want to develop the facts about the uniforms a little? Whom did they belong to?

Q. (By Mr. Landye): Who owned the uniform?

A. The uniforms belonged to the Kaiser Company.

Q. Were they kept there or were they kept by the individual?

A. Some wore them home, and I believe most of them left them there at the guardhouse in lockers that they provided for that purpose.

(Testimony of Collyer T. Potter.)

Q. Let me ask you this question: At 4:00 o'clock, when you [136] reported for roll call, were you required to be in uniform at that time? A. Yes.

Q. If there was any changing from civilian to your guard clothes, that was done prior to 4:00 o'clock? A. That is right.

Mr. Landye: At this time, your Honor, I would like to offer Exhibit No. 31, for identification, in evidence.

Mr. Johnson: Do I understand that this testimony is being offered at this time in connection with the inquiry as to whether or not the claims here involved are subject to the Portal-to-Portal Act of 1947?

Mr. Landye: Yes, and it also goes in for several reasons, not only jurisdiction, the jurisdictional question, but also the question that they were actually required to be there.

Mr. Johnson: I might say this, your Honor: My only point is that I understood from the notices that we had with respect to this particular proceeding that the matter was set for trial on the coverage issue and then that it developed yesterday, by reason of the Portal-to-Portal Act, the Court felt that some inquiry should be made into the jurisdictional question.

I take it, in view of the fact that the case was set for trial on the coverage issue, we are not trying now the merits and details of the claims, but this is offered at this time on the jurisdictional point, is that right? [137]

(Testimony of Collyer T. Potter.)

Mr. Landye: Yes, and for any other purpose that might come in later.

Mr. Johnson: I am not clear on that point. I did not want to go into a trial on the merits at this time. It was my understanding——

Mr. Landye: I understood what the Court wanted was more information; that, as our case would be somewhat different than I think a Portal-to-Portal case would be, the Court wanted before it, some place in these proceedings, information as to what these men actually did, what their claim is.

The Court: We are trying the whole case.

Mr. Johnson: If your Honor please, my understanding of the notice sent out by the Clerk's office was that the Potter case was set for trial on the coverage issue.

The Court: Liability.

Mr. Johnson: I thought it was with respect to the Adams case that the notice on liability came out. In fact, if I remember correctly, the memorandum issued by your Honor, following the pre-trial of March 26th, 1947, concludes "These cases will proceed to trial on the issue of coverage." That is the way my copy reads. I think that is correct.

My point is, that was the issue that I understood we were going to try at this time, except as to the additional issue which arose yesterday that, since Mr. Landye claims that these cases are not covered by the Portal-to-Portal Act, he would make [138] some showing today on the jurisdictional issue so that your Honor could determine whether or not

(Testimony of Collyer T. Potter.)

you could go to the coverage issue, as far as the merits of the claims are concerned. I, therefore, am not prepared. I do not have the witnesses available.

The Court: By "merits," you mean a factual statement like you have just been making?

Mr. Johnson: Yes.

The Court: That they had to be there at a certain time, and something about these clothes——

Mr. Johnson: Yes. I would want to call a witness to rebut this testimony when we get to that point, but my understanding now is we are acting on the jurisdictional problem and, therefore, the burden is on the plaintiff.

The Court: Let me put it this way: I think I understand you. I won't force any issue that you are not prepared on for final determination. This case may end short of it.

Mr. Johnson: That is my point.

Mr. Landye: I move to have Identification No. 31 received in evidence. Do you object to it?

Mr. Johnson: Yes. I will place a general objection on the ground that it is incompetent, irrelevant and immaterial; that no proper foundation has been laid for the introduction of the document.

Mr. Landye: If necessary, I can put one of your men on the [139] stand to lay the foundation for it or I can put the actual man on the stand who got it out, if that is what you want, and prove, if you want me to do that, that this bulletin was issued to all guards. You have got a copy of it.

(Testimony of Collyer T. Potter.)

Mr. Johnson: I just got one about fifteen minutes ago. As a matter of fact, I will admit that it was issued but whether it was issued to all guards or not I don't know.

Mr. Landye: Let me ask the witness a question.

Q. Referring to Plaintiff's Identification No. 31, and particularly referring to the part entitled "General Instructions," was that issued and given to all of the various guards that went to work there?

A. Yes.

Q. At Swan Island? A. Yes.

Mr. Johnson: Wait a minute. I am going to object to that on the ground that no proper foundation has been laid to show that this witness would have any knowledge with respect to all guards.

The Court: Was it issued to him?

Q. (By Mr. Landye): Was it issued to you?

A. Yes, it was.

Q. You were a lieutenant, weren't you?

A. Yes.

Q. Was it issued to everybody under your direct command? A. Yes.

Mr. Johnson: Just a minute. I object to that on the ground that no proper foundation has been laid.

The Court: Was it issued to him when he was a guard?

Q. (By Mr. Landye): Was it issued to you when you were a guard? A. Yes.

Q. Who is Mr. Austin E. Utley?

A. Chief of Guards.

(Testimony of Collyer T. Potter.)

Mr. Landye: I will show you, Mr. Johnson, the other portions of this exhibit. Here is Mr. Utley's signature. I will ask you whether you admit it was sent out to all the people indicated there?

Mr. Johnson: Yes. I will agree that this document indicates that it was issued by Captain Utley to certain persons to whom it is addressed. I refer to the memorandum of March 11, 1944, and the memorandum of March 24, 1944.

Mr. Landye: And the same thing with reference to General Instructions?

Mr. Johnson: Yes. I will admit, also, that Captain Utley was the Chief of the Guards at the Swan Island Yard on the date shown on these two documents, namely March 11, 1944, and March 24, 1944.

Mr. Landye: I think that is all. I will move to admit it in evidence.

Mr. Johnson: I wish to object to its admission, generally, [141] with respect to any persons other than those to whom it is addressed with the exception of the one he testified to. I believe one of these documents was given to him when he came to work.

Mr. Landye: That was the general instructions.

Mr. Johnson: Yes.

Mr. Landye: Correct.

The Court: Admitted.

(Pamphlet containing Instructions to Guards, etc., thereupon received in evidence and marked Plaintiff's Exhibit No. 31.)

PLAINTIFF'S EXHIBIT NO. 31

* * * * *

I have noticed a great deal of laxity or misunderstanding on the part of some of the guards. It seems that they do not realize that they are on duty any time they are around the yard. Regardless of whether it is their day off; whether coming off shift or going on shift. They should be instructed that at the scene of any disorder or disturbance such as occurred at the cafeteria like last night and other times in the past. It is any officer's duty to assist those on duty at such a time. Please see that your men are instructed accordingly and those who fail to comply with this instruction, have them turn their equipment in at once.

* * * * *

Part I. General Instructions.

1. General Outline of Department

* * *

Guards should always remember that in the execution of their duties, they act not for themselves, but for the Company. * * *

3. Reasons for Dismissal.

1. Drinking before coming on duty or while on duty, being under the influence of liquor while on duty in uniform at any time.

* * * * *

4. Deportment.

All members should be prepared to stand roll call thirty minutes prior to relieving the shift on duty. They shall report at Guard Headquarters before going on duty and at the expiration of their tour of duty. Each member will see that a complete and

detailed report is submitted as to all activities occurring during that period.

* * * * *

Lieutenants' Duties.

The Lieutenant shall have, in the absence of the Chief Guard, supervision over all members of the guard and shall see that such guards are detailed to their respective beats, and that such beats are properly patrolled. In the absence of the Chief of Guards, the Lieutenants will be responsible for the efficient conduct of the unit. The Lieutenant will inspect the members of the unit prior to going on duty and inspect the unit at frequent intervals during his tour of duty, rendering a written report of his activities at the conclusion of his tour of duty. He will cause his patrol to assemble in time for roll call before each shift change, making necessary reports of all absentees and shall conduct himself in accordance with all rules and regulations pertaining to the Guard Department.

* * * * *

General: It is quite noticeable that we have some members in our department who seem to be interested only in pay days or getting time. They report for roll call; they are assigned to their posts, and then just idle the time away until the final whistle.

* * *

Beginning next Monday, if I see a man in roll call without his Sam Brown belt (those that have them); without full uniform, or who is not cleanly shaven, I am going to send that man home to clean up or to put on the rest of his uniform. There will be frequent inspections at roll call. They will not be announced. * * *

(Testimony of Collyer T. Potter.)

Q. (By Mr. Landye): Referring now to the time before you were a lieutenant, what did you do or, tell us specifically, when you were doing this guarding, did you guard ships or facilities or what did you do when you were guarding? What was your job, your particular job?

A. Well, when you act as an ordinary guard?

Q. Yes.

A. Well, being posted on some particular spot, it was your business to look out for fires and sabotage and various things that might happen there that would be detrimental to the carrying on of the work?

Q. Do the Instructions to the Guards which were issued to everybody generally, or in more detail, rather, enumerate the types of work you were to do?

A. Yes. [142]

Mr. Johnson: I believe I want to object to that as a conclusion. He is well able to state what he did.

The Court: The answer may stand.

Q. (By Mr. Landye): I am not quite clear about this guardhouse. How large a room was that?

A. I really don't know what the actual dimensions was in feet, but I would say it would be about, over-all, about 30 by 30.

Q. How many guards would they put in the place at one time?

A. Well, they couldn't get them all in there in the squad room at one time. On my particular shift we had at one time 117 men, and we could not get all these men in the squad room—that is where we

(Testimony of Collyer T. Potter.)

called the roll—so some of them were lined up on the outside. There just wasn't room enough for them all to get into the squad room.

Q. Now, when you were a lieutenant and the men had lined up for roll call—— A. Yes.

Q. ——at 4:00 o'clock, or a half hour before you went to your regular posts, did you give them orders at that time or did the captain give orders at that time to the men?

A. Well, presumably a lieutenant was responsible for the activities on that particular shift, and it was his business to issue orders, of course, under general instruction of the Chief.

Q. Let us take it the other way around. When you were a guard, before you were a lieutenant,—better take it the other way [143] around—between 4:00 and 4:30, before you actually got to your post, were you given orders by the various people over you, before you actually went on post, between 4:00 and 4:30?

A. No, I wouldn't say that I was given orders at that particular time.

Q. You had roll call?

A. Had roll call and then after roll call orders were given.

Q. That is what I mean. That would be between 4:00 and 4:30? A. That is right, yes.

Q. What did they do? When you say they had inspection, did they actually have inspection?

A. We tried to see to it if their uniforms were clean and that they were properly cleaned up gen-

(Testimony of Collyer T. Potter.)

erally, not come down with a crop of whiskers—to see that they were presentable.

Q. The senior officer or lieutenant or sergeant would be inspecting? A. That is right.

Q. Would he line you up?

A. Yes, line up. You line up for roll call.

Q. Then what did the officer do? Did he call out your names? A. Call out the names, yes.

Q. Find out if you were present?

A. That is right.

Q. Then, would he go down the line and look over the uniforms?

A. He might not have done that all the time. He could probably [144] give them all a going-over without taking each individual man. If they were not presentable, it would show up, some way or other if he got on his toes. It was a pretty hard matter, when they were as thick as they were in that squad room, to go around among them and see just exactly how they were dressed.

Q. It was at that point, between 4:00 and 4:30, when assignments were made to various posts?

A. That is right.

Q. Who made those assignments?

A. The sergeant, under direction of the lieutenant.

Q. What did he do? Tell the various people to go to various posts? A. That is right.

Q. Then, what happened after that?

A. Well, they would do whatever they were instructed to do on that particular post. Each post

(Testimony of Collyer T. Potter.)

did not just exactly have the same set of orders. There were different things to be done.

Q. All the time you really are claiming for—that is before you became a lieutenant—you performed all that work right in the main shipyard, is that correct?

A. Before I became a lieutenant? Yes, that is right.

Q. That was all in the main shipyard?

A. That is right.

Q. Around the ships? A. Yes. [145]

The Court: What was the distance from the guardhouse?

Q. (By Mr. Landye): What would be the distance from the guard house to the various posts that the men had to go to?

A. Well, there was one post immediately outside of the guardhouse. All around down to the outfitting basin, clear around the yard.

The Court: A mile?

A. Yes, I would say a mile all the way around.

Q. (By Mr. Landye): In other words, the posts would vary from a hundred feet or so to a mile?

A. A mile might be stretching it a little bit.

The Court: Out in the weather? It was outside?

A. Oh, yes, all outside.

Q. (By Mr. Landye): If you would come in at 4:00 o'clock, you would get off, I suppose, at 12:00. After you completed your shift, how long would it take to make out these reports?

A. Well, I would say on an average——

(Testimony of Collyer T. Potter.)

Mr. Johnson: I want to object to that question on the ground it is incompetent, irrelevant and immaterial. Mr. Landye has stated that the claims are confined to a half hour before the shift.

Mr. Landye: That is right. Is this Mr. Potter's record? We did not go into it, but I would like the record to show that he went to work there May 2, 1942, at a rate of 87 cents an hour; and then on 8/9— [146]

Mr. Johnson: August 9th.

Mr. Landye: August 9, 1942, he was raised to \$1.03 an hour. On January 3, 1943, \$1.10 an hour.

Mr. Johnson: As guard sergeant.

Mr. Landye: Then, on February 28, 1943, he became a guard lieutenant at so much a week, I think it was, and his claim cuts off there.

Mr. Johnson: His claim runs from May 2, 1942, to February 28, 1943, when he became a lieutenant?

Mr. Landye: That is correct. That is all.

Cross-Examination

By Mr. Johnson:

Q. In the period, Mr. Potter, from May 2, 1942, to February 28, 1943, while you worked as a guard or a guard sergeant on an hourly basis, how often were you paid your wages by the defendant Kaiser Company, Inc.? A. Once a week.

Q. You were paid regularly week by week, is that correct? A. That is right.

Q. I take it, then, in this period of some eight or ten months—some nine or ten months—you re-

(Testimony of Collyer T. Potter.)

ceived a pay check regularly, week after week, from the defendant, is that right? A. That is right.

Q. You accepted and cashed each of those checks and received the money represented thereby? [147]

A. Yes.

Q. During that period, May 2, 1942, to February 28, 1943, you worked on an hourly wage rate, didn't you? A. That is right.

Q. And you knew, did you not, that in computing the amount due you in these weekly checks you were getting, you were being paid for eight hours a day?

A. That is right.

Q. You knew, did you not, that if you worked a work week of six 8-hour shifts that you would be paid at the hourly rate applicable to your case for forty hours at straight time and for eight hours at time and a half, is that right?

A. That is right.

Q. You knew during this period, did you not, that Kaiser Company, Inc., was not including in the time it was paying you for this half hour you have told us about that you were required to report in advance? A. Yes.

Q. In advance of your arrival at your post of duty?

Mr. Landye: Object to the question, your Honor. It is immaterial whether he did know it or whether he did not know it. There isn't any such a thing as accord and satisfaction in a wage and hour case. Even if he did know it, it didn't make any difference. It didn't make any difference whether he knew it or whether he didn't. [148]

(Testimony of Collyer T. Potter.)

Mr. Johnson: If your Honor please, I am not directing my line of inquiry to that point at all. My line of inquiry is directed to the question as to whether or not the amount now being sued for here was in full payment within the meaning of the Portal-to-Portal Act. The question as to what the plaintiff knew about it is highly material, your Honor, in deciding the question of jurisdiction under the Portal-to-Portal Act.

Mr. Landye: I claim the Portal-to-Portal Act is unconstitutional.

Mr. Johnson: I assume we will get to that in due time, but we can only go one step at a time.

Mr. Landye: It is your step, not mine.

Q. (By Mr. Johnson): You knew when you received these weekly pay checks that Kaiser Company, Inc., was not including in the time basis on which it paid you the amount due the half hour period that you say you were required to report to the guardhouse in advance of your going on your post duty, isn't that right? A. That is right.

Q. When did you first make demand on Kaiser Company, Inc., that it pay you for that half hour that you say you spent at the guardhouse before you went to your post of duty?

A. I don't remember what the dates are there; the time we instituted this lawsuit, whatever date that is.

Mr. Landye: I think it is the first part of January, 1946.

(Testimony of Collyer T. Potter.)

Q. (By Mr. Johnson): If I were to tell you, Mr. Potter, that this [149] lawsuit that we are now trying was instituted by the filing of a complaint with the Clerk of this Court on January 17, 1946, would you say that is the first date on which you made demand on Kaiser Company, Inc., for this amount? A. I would say that is about correct.

Q. As a matter of fact, it was considerably after March 4, 1945, the date on which your employment at the Swan Island Yard ceased, isn't that right?

A. That is right.

Mr. Landye: Can't we agree that, long prior to the filing of the suit, in a conversation between your office and my office concerning this case, you were informed Mr. Potter complained to me some months before that? And can't we agree we did not file the suit for three or four months after our conversation?

Mr. Johnson: Let us put it this way——

Mr. Landye: I mean, to be fair with the witness.

Mr. Johnson: The discussion between you and me did not commence until some three or four months before the suit was filed.

Mr. Landye: That is true.

Mr. Johnson: Which would be some time previous.

Mr. Landye: Oh, yes.

Q. (By Mr. Johnson): As I understand the amended complaint in this case, you are the assignee of all of the plaintiffs named on Exhibit A of the amended complaint, is that right? [150]

A. That is right.

(Testimony of Collyer T. Potter.)

Q. When did you start taking assignments from the plaintiffs in this case?

A. I really don't remember the exact date. It was some time about the time we started the suit there.

Q. Then it was some time after your employment at the yard ceased, wasn't it? A. Oh, yes.

Q. Isn't it a fact, Mr. Potter, that you started activities—let me put it this way: Isn't it a fact that you first got the idea that you were entitled to be paid for this half hour a day reporting time when you heard, some time after your employment ceased on March 4, 1945, that a court somewhere had decided that under the Fair Labor Standards Act this reporting time had to be included in the computation of work time?

A. Well, there were rumblings of that even before I left there in the guard department, but I never paid no particular attention to it until some time after I had left and a great number of the guards asked me what I knew about it.

Q. Fix that time, if you will, please, when you first heard these rumblings that you were entitled to be paid for this reporting time?

A. Well, I should say——

Q. With respect to the date on which your services terminated, March 4, 1945? [151]

A. I would say at some time along in December, 1944.

Q. December of 1944? A. Yes.

(Testimony of Collyer T. Potter.)

Q. Is it not a fact that about that time you heard, somewhere along the line, that a court down in Los Angeles had determined the guards employed by the Consolidated Steel Company of Los Angeles were entitled to pay for their reporting time?

A. No, it is not. I never heard that.

Q. Did you ever hear of that case?

A. Never heard of it.

Q. What did you hear about this matter?

Mr. Landeye: Just a minute. What difference does it make where he heard it? He heard it somewhere along the line, apparently, but what difference does it make how he heard about it? Not that we have any particular objection, but why prolong this case?

Mr. Johnson: I submit, your Honor, if Mr. Landye claims that this is one of the cases which is not covered by the Portal-to-Portal Act, I am entitled to go into the question, in the light of the findings and the policy set out in Section 1 of the Portal-to-Portal Act with respect to windfall payments and an industry being liable for payments which employees theretofore had not expected to receive. I think I am entitled to develop the facts to show that this case falls identically and explicitly within the findings of Congress, as a result of which they passed this [152] Act.

Mr. Landye: What difference does it make? The rumblings started in Kaiser Company along about March 3rd, I believe, or the first part of 1945, some-

(Testimony of Collyer T. Potter.)

where during that time, that the Kaiser Company people got a report or heard rumblings about reporting time.

Mr. Johnson: That is not his testimony. He says——

Mr. Landye: You are the one who started it.

Mr. Johnson: He said he heard about in December, 1944.

The Court: We won't be able to finish tonight. I would like you to be here at 9:30 in the morning.

(Adjournment at 4:55 o'clock p.m.) [153]

Court reconvened at 9:30 o'clock A.M.,
June 26, 1947

COLLYER T. POTTER

plaintiff, having been previously duly sworn, resumed the stand and further testified as follows:

Cross-Examination (Continued)

By Mr. Johnson:

Q. Mr. Potter, when you entered the employ of Kaiser Company, Inc., at its Swan Island Yard, as a guard, on May 2, 1942, did you sign a contract, a written contract of employment? A. No.

Q. When you entered the employ of Kaiser Company, Inc., as a guard on May 2, 1942, did any representative of the defendant tell you that you would be paid for the time that you spent in reporting prior to going on your shift? A. No.

(Testimony of Collyer T. Potter.)

Q. As a matter of fact, no representative of the defendant ever told you that, isn't that correct?

A. That is right.

Q. And it is true, is it not, that at no time during your period of employment from May 2, 1942, through February, 1943, did you ever have a written contract of employment? A. No.

Q. It is true, is it not, that, as far as you know, from May 2, 1942, to March 1, 1945, Kaiser Company, Inc., never paid any [154] guard employed by it for the time required to report in advance of going to post of duty? A. That is right.

Mr. Landye: What is that last date, March 1, 1945?

Mr. Johnson: Yes.

Q. In other words, no such payment was ever made? A. No.

Q. I take it, then, so far as you are aware, in the period from May 2, 1942, to March 1, 1945, there was never in effect at the Swan Island Yard of Kaiser Company, Inc., any custom or practice under which this reporting time was paid for?

A. Not that I know of, no. I don't believe so.

Q. So far as you are aware, you had no written or non-written contract with Kaiser Company, Inc., under the terms of which such time was to be considered in computing wages? A. That is right.

Q. You had no such contract?

A. I had no such contract.

Q. As I understand it, Mr. Potter, you are the assignee of all of the guards who are suing for back wages in this case? A. Yes, sir.

(Testimony of Collyer T. Potter.)

Q. It is correct, is it not, that you did not start obtaining those assignments of claims until after your employment terminated on March 4, 1945.

A. That is right. [155]

Q. About when did you start obtaining the assignment?

Mr. Landye: Objected to, whether he went around—well, why don't you tell him how you happened to obtain them?

Q. (By Mr. Johnson): How did it happen you started obtaining assignments of claims for additional compensation under the Fair Labor Standards Act against Kaiser Company, Inc., Swan Island Yard?

A. A number of men came to my office and asked me what I knew about this, about this claim for overtime.

Q. Yes.

A. And, as a matter of fact, I didn't know very much about it. I didn't pay very much attention to that but so many kept coming in that I investigated and found that it was a legitimate claim under the Fair Labor Standards Act.

Q. Now, you say you investigated. Tell us what you did.

A. I went to the Bureau and got a copy of the law.

Q. Pardon me?

A. I went to the Bureau of the—the Fair Labor Standards Act Bureau.

(Testimony of Collyer T. Potter.)

Q. You mean the Wage and Hour Division of the Department of Labor? A. That is right.

Q. Whom did you see there?

A. I don't remember his name. I saw the man in charge there. I don't remember his name. [156]

Q. Did he tell you that in his opinion, because of certain decisions of the courts he thought you had a claim against the defendant? A. He did.

Q. Did he ask you whether or not you had ever made a demand on the company to pay you the wages, while you were working for it? A. No.

Q. Did he ask you whether the company had ever agreed to pay you such wages? A. No.

Q. He just told you he thought you had a claim, is that right? A. That is right.

Q. About when did that happen, Mr. Potter?

A. Well, I would say that was three or four months after the termination of my employment.

Q. That would be around June or July, 1945.

A. I should say around there.

Q. What did you do after you got this advice from this Government official that he thought you had a claim?

A. I talked with the men as they came in, for some little time, about it, and they importuned me to take some action for them.

Q. You told them of this conversation you had with this Government official?

A. That is right. I told them of this conversation I had, so then I began to take their names and addresses and I contacted [157] the firm of Green & Landye to represent us.

(Testimony of Collyer T. Potter.)

Q. I take it at that time you decided you would all get together and file a lawsuit?

A. That is right.

Q. And see if you would get the money, is that right? A. That is right.

Q. Did you know the various persons who are named as plaintiffs with you in this case while you were working as a sergeant—withdraw that—as a lieutenant at the Swan Island Yard?

A. Yes, I know personally nearly all of them.

Q. I take it you never told any of them that the company would pay them for this reporting time—I mean, while you were working as a lieutenant for that company, you never told any of these plaintiffs that they would be paid for reporting time, did you?

A. No, I didn't.

Q. As far as you know, they were never paid for that time, were they? A. That is right.

Mr. Landye: Why go over that? That is why we are suing here. We agree we were not paid for that half hour. That is why we are here in this court now.

Mr. Johnson: I am simply trying to establish facts with reference to the jurisdictional question. I take it, Mr. Landye, that there is no claim by the plaintiffs that at any time during [158] their employment at the Swan Island Yard of Kaiser Company, Inc., was there in effect a written or non-written contract, under the terms or express provisions of which reporting time was compensable?

Mr. Landye: I will put it this way: That approximately to March 3, 1945, these men were

(Testimony of Collyer T. Potter.)

required to report for work, according to their instructions, a half hour before they actually went to their posts, for roll call, inspection, and that type of thing; and that, if they did not show up, as was testified to on the stand, for that half hour they were discharged, if they did not get there a half hour earlier; and that after, roughly, March 3, 1945, Kaiser Company, Inc., then eliminated the roll call and eliminated the half hour and so they, at that time, only appeared at 4:30 at their posts.

We will stipulate that none of the men have ever been paid for that half hour and that is the reason we are in court now. Certainly we do not claim we were paid for it. We wouldn't be here otherwise.

The Court: He wanted to know if you had a written or unwritten contract.

Mr. Landye: I want to ask the witness one question. Maybe I can straighten it out in my own mind.

Q. There was no union down there, was there?

A. No.

Q. The guards were not organized? [159]

A. The guards were not organized.

Mr. Landye: No. We will say that there was no written contract or oral contract that I can prove, at least, that this half hour was to be compensated for.

Mr. Johnson: I take it, too, from your statement, since you say none of them were paid at any time, that there was no custom or practice at the Swan Island Yard under which the time was compensable?

(Testimony of Collyer T. Potter.)

Mr. Landye: Unless I can take custom and practice retroactively. After March 3, 1945, they discontinued the practice.

Mr. Johnson: If they did not have any reporting time, they could not have paid for it then?

Mr. Landye: No. I do not want to clutter up the record with things I can't prove. That is the fact, though.

Mr. Johnson: That is all of the examination I have of this witness at this time, your Honor. If we go to the merits, I would like to reserve the right to recall him for further examination.

Redirect Examination

By Mr. Landye:

Q. Just to clear up one thing: You have never been paid for this half hour time that you reported for roll call and until you actually got to your post?

A. Never.

Q. How much time did you spend altogether, from the time you [160] were at your actual post until you were relieved again? Was that eight hours?

A. Eight hours.

Q. So, including this half hour, then, it would be eight and a half hours, is that correct?

A. Yes, at least eight and a half hours.

Q. At least eight and a half hours?

A. Yes.

Q. Then you worked six days a week, is that correct?

A. Yes.

(Testimony of Collyer T. Potter.)

Q. Were you paid overtime for that sixth day, do you remember?

A. Yes, I think we had some overtime arrangement after forty hours.

Mr. Landye: I guess that is all.

Recross-Examination

By Mr. Johnson:

Q. Just one question, Mr. Potter: In other words, in your employment as a guard at the Swan Island Yard, you were paid time and a half for hours in excess of forty per week, as those hours were computed and recorded by the defendant, Kaiser Company, Inc., isn't that correct?

A. That is right.

Q. Your claim here is that, in computing those hours and determining the time in each week that you worked, they did not include this reporting time, isn't that correct? [161]

A. That is right.

Mr. Johnson: That is all.

(Witness excused.)

Mr. Landye: I think I can enter into a stipulation with Mr. Johnson that the other plaintiffs, Mr. Farrell, Mr. Kolmer, Mr. Curveon and Mr. Cozad, if called as witnesses in this case, would testify the same as Mr. Potter did, to the same state of facts, and would have answered the questions on cross-examination, in so far as they were pertinent to their particular matter, in the same manner, and

that would include, also, I understand, Mr. Johnson, Exhibit 31, that they were given a copy of the General Instructions.

Mr. Johnson: For the purpose of this issue of jurisdiction under the Portal-to-Portal Act, I am willing to enter into that stipulation.

Mr. Landye: And, just for the purpose of the record, just to complete it, I can stipulate with you that Mr. John Farrell went to work February 13, 1943, at a rate of 95 cents a hour, and that on March 21, 1943, he was raised to \$1.03, and that on 10/3—that would be October 3, 1943—he was raised to \$1.05, and that on March 3, 1944, he was raised to \$1.15. I don't understand this. It shows "Guard" but seems to have dropped down to \$1.05.

Mr. Johnson: That applies to the preceding line.

Mr. Landye: Yes. Then, September 17, 1945, he went to \$1.05.

Mr. Johnson: March 4, 1946, he was raised to \$1.23. That is this year; 1946, rather. I think he is still working for them.

Mr. Landye: Wait a minute. He is down there working today. That is why he is not in court.

The Court: Mr. Whitaker has a suggestion to make to you, Mr. Landye.

Mr. Landye: The man is still working. Kolmer went to work May 7, 1942, at 87 cents an hour; June 15, 1942, 95 cents an hour; January 3, 1943, \$1.03 an hour; April 4, 1943, \$1.10; October 3, 1943, \$1.20; terminated August 31, 1945.

Charles Cozad went to work June 6, 1942, at 87 cents an hour; January 3, 1943, \$1.03; February 4, \$1.10; October 4, 1943, \$1.20; March 4, 1946, guard sergeant, \$1.38; and left on March 7, 1946.

James Curveon went to work on July 3, 1942, at a rate of \$1.01; July 4, 1942—strike that out.

The first employment he had was not as a guard. It was as an oiler for one day, July 4, 1942. February 21, 1943, he started as a guard, 95 cents; February 21, 1943, \$1.03; October 3, 1943, he was getting \$1.05, and left his employment on 9/16—that would be September 16, 1945.

Mr. Johnson: Those dates and rates are correct.

Mr. Landye: That is all, your Honor.

Mr. Johnson: I have nothing to offer on this particular aspect of the case in the light of the testimony of Mr. Potter and the stipulation with respect to the testimony of the other witnesses. If that concludes the plaintiff's showing on jurisdiction under the Portal-to-Portal Act, I would like to be heard on the issues.

Mr. Landye: Yes.

The Court: I suggest, to point the matter up, I will now entertain a motion to dismiss for want of jurisdiction under the Portal-to-Portal Act of 1947.

DEFENDANT'S MOTION FOR DISMISSAL

Mr. Johnson: If your Honor please, at this time, in view of the showing adduced by the plaintiffs, with respect to the nature of the claims here involved, and in the light of the provisions of the recent enactment of Congress known as the Portal-to-Portal Act of 1947, I wish at this time to move to dismiss the pending action now before the Court on the grounds (1) that, under the provisions of Section 2(a) of the Portal-to-Portal Act, no showing has been made warranting the imposition of liability against the defendant under the terms of the Fair Labor Standards Act, as amended by the Portal-to-Portal Act; and (2) on the ground that, under the provisions of Section 2(d) of the Portal-to-Portal Act, the Court has been deprived of [164] jurisdiction over this action, for the reason that the testimony of the plaintiffs establishes that the case does not fall within the two situations mentioned in Section 2(a), subdivision (1) and (2), under which liability for claims existing prior to May 14, 1947, the effective date of the Portal-to-Portal Act remain, and the jurisdiction of the Court to enforce such claim remains.

On these grounds I move that the matter be dismissed and that no further proceedings be had by this Court, for the reason that the Court, under the recent enactment of Congress, is without jurisdiction over the proceedings. [165]

* * * * *

The Court: Tinkering with jurisdiction to accomplish a substantive purpose is a very dangerous thing, and some day the lawyers of this country will wake up to that danger and will throw their weight against it. The people who conceived the idea and turned it loose on the American people have no reason to be proud of their creation, in my opinion. This has been going on for some time.

In addition to the Acts previously referred to, now [185] we have got the Renegotiation Acts where it is provided that a man can be sued but cannot defend. Somebody, sometime, is going to condemn that idea that courts can be used to hit somebody whose hands are tied in advance and he cannot defend. The same idea was in the OPA legislation and elsewhere.

But, regardless of how I feel about it, it is my duty to follow authority, and authority in this country has upheld prior legislation where the same principle is involved and, therefore, compels me to sustain the motion to dismiss, and that will be the order, with exception to the plaintiffs.

Mr. Landye: May I ask the Court that the actual signing of the order be held up until my reply gets in?

The Court: That is understood. [186]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Ira G. Holcomb, a Court Reporter of the above-entitled Court, duly appointed and qualified, do hereby certify that on the 24th, 25th and 26th days of June, A. D. 1947, I reported in shorthand certain proceedings had in the above-entitled cause, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, pages numbered 1 to 186, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said dates as aforesaid, and of the whole thereof.

Dated this 15th day of December, A. D. 1947.

/s/ IRA G. HOLCOMB,
Court Reporter.

[Endorsed]: No. 11889. United States Circuit Court of Appeals for the Ninth Circuit. C. T. Potter, et al., appellants, vs. Kaiser Company, Inc., a corporation, and United States of America, appellees. Transcript of Record Upon Appeal from the District Court of the United States for the District of Oregon.

Filed April 2, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Circuit Court of Appeals of the United States
for the Ninth Circuit

No. 11889

C. T. POTTER, et al.,

Plaintiffs,

vs.

KAISER COMPANY, INC., a corporation,

Defendant,

THE UNITED STATES OF AMERICA,

Intervenor.

STATEMENT OF POINTS UPON WHICH
PLAINTIFFS - APPELLANT INTEND TO
RELY ON APPEAL

Now come the plaintiffs-appellant and each of them and hereby adopt the statement of points upon which the plaintiffs-appellant intend to rely on appeal that was filed in the District Court of the United States for the District of Oregon as the points upon which they intend to rely for appeal in this Circuit Court of Appeals of the United States.

Dated this 5th day of April, 1948.

GREEN, LANDYE &
PETERSON,

By /s/ JAMES LANDYE,

Attorneys for Plaintiffs-
Appellant.

Due service of the within Statement of Points is hereby accepted in Multnomah County, Oregon, this 5th day of April, 1948, by receiving a copy thereof duly certified as such by James Landye of attorneys for plaintiff.

/s/ RICHARD DEVERS,
Of Attorneys for Defendant,
UNITED STATES OF
AMERICA,

By /s/ EDWARD B. TWINING,
Assistant U. S. Attorney.

[Endorsed]: Filed April 7, 1948.

In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

Appellees.

APPELLANTS' BRIEF

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No. 11889

**In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

C. T. POTTER, et al.,	Appellants,	}
v.		
KAISER COMPANY, INC., a corporation, and UNITED STATES OF AMERICA,	Appellees.	

Upon Appeal from the United States District
Court for the District of Oregon.

APPELLANTS' BRIEF

Jurisdiction

This is a civil action by employees to collect unpaid overtime compensation pursuant to the Fair Labor Standards Act of 1938, (52 Stat. 1060; 29 U.S.C.A., sec. 201) all as alleged by the amended complaint herein. (Tr. 4) The Court below had jurisdiction under Section

16 (b) of that Act and under Section 24 (8) of the Judicial Code. (28 U.S.C.A., sec. 41 (8)). The case was dismissed for want of jurisdiction in reliance upon the Portal-to-Portal Act of 1947. (61 Stat. 84; 29 U.S.C.A., sec. 251) That Act was pleaded in defense by the defendant Kaiser Company. (Tr. 15, 24)

This appeal is taken pursuant to section 128 of the Judicial Code (28 U.S.C.A., sec. 225) and questions whether the Portal-to-Portal Act is applicable to the facts of this case and, if so, whether that statute is constitutional.

The sections of the Portal-to-Portal Act involved in this case are: Section 2 (a), which absolves employers from liability under the Fair Labor Standards Act for failure to pay overtime compensation or for any activity prior to enactment of the Portal-to-Portal Act unless the same was made compensable either by contract or by custom or practice; Section 2 (c), which provides that only such time shall be regarded as time worked under the Fair Labor Standards Act; and Section 2 (d), which deprives both federal and state courts of jurisdiction over cases involving claims not compensable under Section 2 (a).

STATEMENT OF THE CASE

As stated above, this is an action to recover unpaid overtime compensation pursuant to the Fair Labor

Standards Act of 1938. The original complaint in this case was filed on January 17, 1946. (Tr. 50) On April 3, 1947, an amended complaint was filed, alleging that defendant Kaiser Company is a Nevada corporation and was at that time engaged in the operation of the Swan Island shipyard in Portland, Oregon, where it was engaged in the construction and repair of ships for and in interstate commerce, with materials received in interstate commerce; (Tr. 51, 4, 5) that plaintiffs (whose names are listed in the Transcript, pp. 8-14) were employed as guards in activities necessary to the production of ships for interstate commerce and repair of ships engaged in interstate commerce; (Tr. 5, 6) and that plaintiffs were compelled and required to work certain hours of overtime in excess of forty hours per week for which they received no compensation, as required by the Act. (Tr. 6, 7)

The amended answer of defendant Kaiser Company, filed on June 24, 1947, alleges, among other things, that on May 14, 1947, the Portal-to-Portal Act was enacted; that Section 2 (a) of the Act barred compensation for activities not compensable by contract or by custom or practice; that the activities of plaintiffs were not so compensable and that Section 2 (d) of the Act further removed jurisdiction of the court over the case. (Tr. 52, 15, 24-25)

A reply was filed by plaintiffs, denying these allegations of the answer and, as an affirmative reply, alleging as follows :

“that said Act does not apply to plaintiffs in this particular case, in that the work involved in this particular case is not portal-to-portal work ; that, instead, the overtime asked for in this particular case is for work involving guards who had to stand roll call and inspection, receive orders and then go to their posts ; that all of the said activities consumed thirty minutes ; that the employees, by written rule of the company were required to be at the roll call and at the guard house thirty minutes before actually going to their posts of duty in the particular sections of the yard ; that a guard was under the penalty of being fired or discharged if he did not so report for work at this particular time and stand roll call and inspection and have his assignments made ; that all of said work and activities were work within the meaning of the Fair Labor Standards Act ; that the Portal-to-Portal Act was not intended at any time to cut off or in any way bar suits of this kind and nature ; that time is not asked for in this case from the time men reported on the premises, but, rather, it is asked for the time they were required to report at the guard house under penalty of discharge if they did not do so, and said roll call, inspection and taking of assignments were part of the main activities of guarding said property.”
(Tr. 28-29)

Plaintiffs' reply also alleged that the causes of action arose prior to the Portal-to-Portal Act and that the Act is unconstitutional as applied to this case in that the Act would violate the due process clause of the Fifth Amendment and would invade the domain of the judiciary in

violation of Article III, Sections 1 and 2. (Tr. 30-32)

The case was set down for trial on the question of jurisdiction and, on June 24, 1947, this question was tried before the Court, sitting without a jury. (Tr. 52) The United States of America was then allowed to intervene for the purpose of defending the constitutionality of the Portal-to-Portal Act. (Tr. 33-37)

The evidence adduced at the trial included written General Instructions issued to all guards, stating that:

“All members should be prepared to stand roll call thirty minutes prior to relieving the shift on duty.”
(Tr. 70; Exhibit 31)

The testimony showed that each day all guards were required to have their uniforms on and be ready for roll call thirty minutes in advance of the time they went on patrol duty; (Tr. 58) that the uniforms were owned by the company and were usually left at the guardhouse in lockers provided for that purpose; (Tr. 64) that at the roll call there was an inspection to see that uniforms were in order and clean; (Tr. 59, 64, 70) that orders of the day were then read and the guards were assigned to their posts and given instructions; (Tr. 59) and that the guards then marched in military formation to their various posts (Tr. 59) which ranged in distance from a short distance to nearly a mile. (Tr. 75) It appeared further that men were discharged if they failed to report for roll call thirty minutes in advance of their shift

(Tr. 62) or without full uniform and neatly shaven (Tr. 64) and that the company regarded its guards as being on duty at all times when they were around the yard for the purpose of assisting in handling of any disorders. (Tr. 70) Finally, it appeared that although the guards were not organized and had no written contract of employment (Tr. 87) they were paid on the basis of hourly rates, with time and one-half for work in excess of eight hours in any one day, and forty hours in any week (Tr. 76, 77), but had not been paid for the time spent in the above-described activities. (Tr. 78)

At the conclusion of the testimony defendant moved to dismiss the case and the Court made the following statement on the record:

“Tinkering with jurisdiction to accomplish a substantive purpose is a very dangerous thing, and some day the lawyers of this country will wake up to that danger and will throw their weight against it. The people who conceived the idea and turned it loose on the American people have no reason to be proud of their creation, in my opinion.”

* * *

“But, regardless of how I feel about it, it is my duty to follow authority, and authority in this country has upheld prior legislation where the same principle is involved and, therefore, compels me to sustain the motion to dismiss, and that will be the order, with exception to the plaintiffs.” (Tr. 93)

On January 21, 1948, the Court issued a memorandum opinion that the facts of the case were within the Portal-

to-Portal Act; that the Act was constitutional, and that the case would be dismissed for want of jurisdiction. (Tr. 37) On the same date the court filed findings of fact, including a finding as follows:

“That the plaintiffs were required to report for roll call at the guardhouse 30 minutes prior to relieving the shift on duty; that, during this said 30 minutes, plaintiffs were required to stand roll call, inspection, receive assignments, and to proceed to their posts of duty which were varying distances from the guardhouse; that the said guardhouse was located on the property inside the gate at Swan Island; that the plaintiffs worked 30 minutes per day during the period above mentioned, namely from February 1, 1942, to March 4, 1945, six days a week, without receiving overtime compensation; that the plaintiffs were not only required to report 30 minutes prior to the time on the premises of the employer but were disciplined for failure to do so.” (Tr. 39)

The court went on to find that these activities were preliminary or postliminary to the principal activity of plaintiffs in guarding the shipyard; that there was neither contract nor custom requiring payment for these activities and that under Sections 2 (a), (b) and (d) of the Portal-to-Portal Act the Court had no jurisdiction of the case. (Tr. 40-42) Accordingly, the case was dismissed for want of jurisdiction. (Tr. 43-44).

Thereafter, plaintiffs duly perfected their appeal from the judgment of dismissal, (Tr. 44-49) which pre-

sents to this court the question whether the Portal-to-Portal Act is applicable to the facts of this case and, if so, whether that Act is constitutional.

SPECIFICATION OF ERRORS

1. The Court erred in making the following finding of fact :

“The hours of overtime for which plaintiffs seek compensation by their complaint herein relate to activities which were preliminary to or postliminary to the principal activity of plaintiffs as aforesaid, namely, guarding said shipyard; and plaintiffs have been paid in full for all services performed by them in the performance of said principal activity.” (Tr. 39-40)

Said finding was in error for the reason that the evidence submitted by plaintiffs (Tr. 58-76) and the previous findings made by the Court (Finding of Fact No. 2, Tr. 39), when considered in the light of the provisions, legislative history and intent of the Fair Labor Standards Act and the Portal-to-Portal Act, make it clear that the hours of overtime for which plaintiffs seek compensation in this case were not “preliminary” or “postliminary” to their “principal” activity of guarding said shipyard, but that in this case plaintiffs were required by defendant Kaiser Co. to report for roll call, inspection, assignments of posts and orders thirty minutes in advance of actual patrol duty and that said overtime

hours were indispensable to the guarding of said shipyard and were an integral part of and among the "principal" activities which said plaintiffs were employed to perform and constituted "hours worked" for which plaintiffs have not been paid but for which plaintiffs are entitled to receive overtime compensation under the provisions of the Fair Labor Standards Act and for which plaintiffs are not barred from recovery by the provisions of the Portal-to-Portal Act.

2. The Court erred in making the following finding of fact:

"The only contract, written or otherwise, between plaintiffs or any of them and defendant, the United States of America, or the United States Maritime Commission with respect to employment at said shipyard was that plaintiffs and each of them would be compensated and paid for the time spent by them in actually guarding said shipyard, as distinguished from any preliminary or postliminary activities in connection therewith. Said contract has been fully performed and plaintiffs and each of them have been fully paid and compensated for the time spent in actually guarding said shipyard; and in fact, none of the plaintiffs contend or assert that such contract has not been fully performed." (Tr. 40)

Said finding was in error for the reason that the hours of overtime for which plaintiffs seek compensation were not "preliminary" or "postliminary" activities, but, as pointed out above, were indispensable to, an integral

part of and among the “principal” activities which plaintiffs were employed to perform and were compensable under plaintiffs’ contract of employment, which has not been fully performed in that plaintiffs have not been paid any compensation for such activities.

3. The Court erred in making the following conclusion of law:

“There was no express provision of a written or non-written contract in effect at the time plaintiffs served as guards at said shipyard, between plaintiffs or their agents or collective bargaining representative and defendant or the United States of America or the United States Maritime Commission pursuant to which the preliminary and postliminary activities referred to above and the time spent in performing the same were compensable, either with respect to straight-time compensation or overtime compensation.” (Tr. 41)

The foregoing conclusion of law is in error for the same reasons as stated above with respect to the finding of fact quoted in Specification No. 2.

4. The Court erred in making the following conclusion of law:

“That under the provisions of Section 2 (d) of the Portal-to-Portal Act of 1947 this Court has no jurisdiction over this action, for the reason that it is an action to enforce liability for or on account of the failure of the alleged employer of plaintiffs to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended, with respect to an activity which was not compensable under Sec-

tion 2 (a) or Section 2 (b) of the Portal-to-Portal Act of 1947.” (Tr. 42)

The foregoing conclusion of law is in error for the reason that the Portal-to-Portal Act has no application to the facts of this case and that if the Portal-to-Portal Act has application to the facts in this case, that said Act is unconstitutional; that particularly the provisions of Sections 2-A, 2-B, and 2-D, of said Act are unconstitutional as applied to these plaintiffs-appellant in that said provisions of said Act violate the Due Process Clause of the Fifth Amendment of the Constitution of the United States and violate Article III, Section 1 and 2, of the Constitution of the United States.

5. The Court erred in making the following conclusion of law:

“The case should be dismissed for want of jurisdiction.” (Tr. 42)

The foregoing conclusion of law is in error for the same reasons as stated above with respect to the conclusion of law quoted in Specification No. 4.

6. The Court erred in entering judgment dismissing said action for want of jurisdiction. (Tr. 43-44)

The entry of said judgment was in error for the same reason as stated above with respect to the conclusion of law quoted in Specification No. 4.

SUMMARY OF ARGUMENT

I. THE PORTAL-TO-PORTAL ACT HAS NO APPLICATION TO THE FACTS OF THIS CASE.

- A. The Portal-to-Portal Act was not intended to apply to cases where, as here, employees were **REQUIRED** to report at a specified time and place in advance of their regular shifts.
- B. The Portal-to-Portal Act has no application in this case for the further reason that if the activities in question were not “preliminary” or “postliminary” they were compensable under the contract of employment.
- C. The Portal-to-Portal Act has no application in this case for the further reason that the contract of employment at hourly rates, with time and one-half for overtime, required that plaintiffs be compensated for the time spent in the activities in controversy, although not paid for in the past.
- D. The Portal-to-Portal Act has no application in this case for the final reason that there was an implied, if not express, contract to pay plaintiffs for the activities in controversy.
- E. If defendant contends that plaintiffs have been paid in full for all time worked, including the activities in question, then the law requires ad-

ditional one-half time pay for all such time over 40 hours in any week.

II. IF THE PORTAL-TO-PORTAL ACT HAS APPLICATION TO THE FACTS OF THIS CASE, THEN SAID ACT IS UNCONSTITUTIONAL AS APPLIED TO SUCH FACTS.

- A. The claims of Plaintiff in this case are not purely statutory rights but are vested property rights, and even if statutory rights are of a compensatory nature and therefore cannot be completely destroyed.
- B. Even rights subject to the commerce power are protected by the guaranty of the process of law, which would render the Portal-to-Portal Act unconstitutional as applied to the facts of this case.
- C. To withdraw jurisdiction of both state and federal courts to provide any remedy whatever for the claims involved in this case would be to destroy the right of compensation itself and would violate the due process clause of the Fifth Amendment.
- D. In this case there can be no validation by the Portal-to-Portal Act of a previously invalid contract not to pay compensation for the activities here involved for the reason that there was no such con-

tract and, on the contrary, it was either expressly or impliedly agreed that plaintiffs would be compensated for such activities.

PERTINENT STATUTORY PROVISIONS

The pertinent provisions of the Portal-to-Portal Act of 1947, (61 Stat., 84; 29 U.S.C.A. sec. 251), are the following:

“SEC. 2. RELIEF FROM CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALY ACT, AND THE BACON-DAVIS ACT.—

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or non-written contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

* * *

“(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.”

ARGUMENT

I. THE PORTAL-TO-PORTAL ACT HAS NO APPLICATION TO THE FACTS OF THIS CASE.

A. THE PORTAL-TO-PORTAL ACT WAS NOT INTENDED TO APPLY TO CASES WHERE, AS HERE, EMPLOYEES WERE REQUIRED TO REPORT AT A SPECIFIC TIME IN ADVANCE OF THEIR REGULAR SHIFTS.

It is, of course, a well known fact that the sole reason for passage of the Portal-to-Portal Act was the decision

of the Supreme Court of the United States in *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680. It thus becomes of importance to analyze that case in order to determine the nature of the problem with which Congress intended to deal. The issue in that case was whether time spent by employees in walking from where they punched the time clocks to their particular places of work and in certain preliminary duties in order to get ready to work was "time worked" for the purposes of overtime compensation under the Fair Labor Standards Act. In the course of the decision we find the following statement.

"They were required to be ready for work at their benches at the scheduled starting times. They were given 14-minute periods in which to punch the time clocks, walk to the places of work and prepare for productive labors. But there was no requirement that an employee check in or be on the premises at any particular time during that 14-minute interval. As noted by the District Court, there was no evidence 'that if the employee didn't get there by 14 minutes to seven he was fired and there is much testimony to prove that stragglers came in as late as one minute to seven.' 60 F. Supp. at 149. Indeed, it would have been impossible for all members of a particular shift to be checked in at the same time in view of the rate at which the time clocks were punched." (Id. at 689)

The Court went on, however, to hold that *even though employees were not required to report at any specified time in advance of their regular shifts*, their activities of walking from the time clocks to their particular

places of work and their preliminary duties in getting ready to work were nevertheless for the benefit of the employer, rather than for their own convenience, and that if such activities required any substantial time they would be entitled to receive overtime compensation under the Act.

Such was the decision which Congress sought to remedy in the Portal-to-Portal Act and, it is submitted, that the Act was designed solely to remedy the possibility of liability to employers arising from similar situations in which, in view of the *Mt. Clemens* case, they might be held liable for large amounts of back wages and liquidated damages for walking time and other preliminary activities, *even though they had not required their employees to report at any specified time in advance of their regular shifts*. It is further submitted that in drafting and adopting this Act Congress had no intention of applying its provisions to situations in which employees were *required* to report at a specified time in advance of their regular shifts and, on the contrary, intended that under such situations the Portal-to-Portal Act would not apply, but that employees would be entitled to compensation for such time under the Fair Labor Standards Act.

That such was the intent of Congress in adopting the Portal-to-Portal Act is clear from the following references to its legislative history :

In House Report No. 71, 80th Congress, 1st Session, page 13, reference is made to the "new doctrine" of the *Mt. Clemens* case and the following statement is then made:

"Following the decision in the Mount Clemens Pottery case, many suits were filed in all parts of the country seeking to recover large amounts claimed to be due *under the formula laid down in that case.*"

In the debate on the Act in the House of Representatives we find the following colloquy between Representative Miller and Representative Walter, relating to Section 3 of the original House bill, section 2 of the present Act:

"MR. MILLER of Connecticut. Mr. Chairman, will the gentleman yield?

MR. WALTER. I yield to the gentleman from Connecticut.

MR. MILLER of Connecticut. As a layman, I cannot quite understand the language in section 3, (Section 2 of the final Act) particularly the words 'either by custom or practice.' Would that mean that if the custom or practice is admittedly bad or in error that would be a defense?

"MR. WALTER. I was about to come to that. That phase of the problem as contained in section 3 of the bill caused our committee a great deal of trouble. What is custom and practice? What is the custom and practice in determining what the employer has a right to compel employees to do? You will notice that language applies to activities that are heretofore or hereafter engaged in. As to activities heretofore engaged in there can be little question; however, as to what is a custom or practice in a new

business will cause difficulty. Bearing in mind the fact there are about 55,000 new employers a year, of course we can foresee difficulty. But *custom and practice in that connection means a custom and practice not in violation of the law. Certainly no employer could, for example, compel an employee to get to his place of business an hour before he punches the clock and because he had done that for a while relieve himself of his responsibility to comply with the law by saying, 'That is the custom and practice of my business.'* No court would uphold any arrangement of that sort. Certainly that is work under any of the definitions of the courts and we have to rely on a common-sense interpretation of that language." (Cong. Rec., 80th Cong., 1st Sess., Vol. 93, pp. 1550-1551.)

A similar understanding and intent on the part of the Senate is clear from the colloquy between Senator Pepper and Senator Baldwin, Congressional Record, 80th Congress, 1st Session, p. 2381, as follows:

MR. PEPPER . . . "in the South, where it is my privilege to live, a new enterprise or a new factory may be established, giving employment to the women of the community. That is certainly a desirable objective. However, too often—if not generally—those women will be told, 'Come here half an hour before the time to go to work and get your machines ready, get your needles threaded, get your materials laid out, or get your patterns fitted. Get everything ready on your time.' "

* * *

"MR. BALDWIN. My learned friend from Florida, for whose ability and oratory I have high respect, has stated a case in Florida in which certain time would not be compensated for. The case is almost on all-fours with the first category. In my

State of Connecticut there would be no question but that the time would be compensated for. So I submit that my learned friend must get a better case than that."

The same understanding of the purpose and intent of the Portal-to-Portal Act in this respect is reflected by the decisions of the courts. Thus in *Western Union v. McComb*, (CCA 6th) 165 F (2d) 65, an injunction proceeding, the court stated at page 73 with reference to the Act that:

"The underlying reason for its enactment was to foreclose myriads of suits demanding some six billion dollars as compensation for '*walking time*' and *the like*, brought in pursuance of the doctrine announced by the Supreme Court in *Anderson v. Mt. Clemens Pottery Co.*, . . ."

Likewise, in *Tricomi v. Palumbo Cigar Co.*, (N.Y. Sup. Ct.) 7 W. H. Cas. 879, the court stated that:

"*The history of the act clearly imparts it was intended to reach demands arising from claimed activities having no direct relation to the business of the employer either by virtue of custom or contract. Defendants do not assert plaintiff was not engaged in some way as foreman or otherwise in production in their business, but contend that some of the time devoted to their business was beyond the permissible contract period and therefore no contract or custom exists requiring payment for such extended time of service. This is not the kind or nature of activity whose compensation is proscribed.*"

In this same connection it is to be noted that as early as October 30, 1940 the U. S. Department of Labor is-

sued a bulletin known as "Interpretive Bulletin No. 13", on the subject "Hours Worked", in which the following general rule was stated in paragraph 2 thereof:

"As a general rule, hours worked will include (1) all time during which an employee is *required* to be on duty or to be on the employer's premises or at a prescribed work place, and (2) all time during which an employee is suffered or permitted to work whether or not he is required to do so."

It may perhaps be said that the Portal-to-Portal Act limits the proposition that an employee is to be paid for time during which he is suffered or permitted to work when not *required* to do so by the statutory requirement that there must be a contract or custom before such time is compensable. But the idea that working time for the purposes of the Fair Labor Standards Act starts when an employee is required to report at a specified time and place has never been seriously controverted and has been firmly established for many years—long before the *Mt. Clemens* case created the situation sought to be remedied by the Portal-to-Portal Act.

Thus it is crystal clear that Congress did not intend to apply the Act to situations such as those involved in this case in which employees were *required*, under penalty of discharge, to report at the guardhouse for roll call, inspection, assignment of beats, and daily orders, thirty minutes in advance of going on actual patrol duty.

The contrary result urged by defendants in this case would mean that an employer who willfully violated the Fair Labor Standards Act would be in a better position than one who tried to comply, but made an inadvertent mistake. Thus, an employer who attempted to pay overtime to all employees, but overlooked a few employees, would be held liable by the contract and custom established for the others. But an employer who *required* all employees to report half an hour early for work, as in the examples cited by Rep. Walter and Sen. Pepper, and then willfully refused to pay anything for that half-hour would now go free under defendant's position for the reason that there was no custom or contract for payment. That such was not the intent of Congress is clear from the legislative history quoted above, as well as from the fact that a statute so intended to favor willful law violators would be contrary to public policy.

B. THE PORTAL-TO-PORTAL ACT HAS NO APPLICATION IN THIS CASE FOR THE FURTHER REASON THAT IF THE ACTIVITIES IN QUESTION WERE NOT "PRELIMINARY" OR "POSTLIMINARY" THEY WERE COMPENSABLE UNDER THE CONTRACT OF EMPLOYMENT.

In this case the court below, on application of defendants, made findings and conclusions that *the activities here in dispute were "preliminary to or postliminary to the principal activity of plaintiffs as aforesaid, namely, guarding said shipyard; . . ."* (Tr. 40); that the only contract between the parties was "that plaintiffs and

each of them would be compensated and paid for the time spent by them in actually guarding said shipyard, *as distinguished from any preliminary or postliminary activities in connection therewith. . . .*" (Tr. 40); and that there was no express provision of any contract "pursuant to which the preliminary and postliminary activities referred to above and the time spent in performing the same were compensable, . . ." (Tr. 41)

It follows that if the Court erred in holding that the activities in question were "preliminary" or "postliminary" they were compensable under the contract of employment, which admittedly provided compensation for all activities not of a "preliminary" or "postliminary" nature, and that, therefore, such claims are not barred by the Portal-to-Portal Act. As demonstrated below, however, it cannot be said that the activities of guards who are *required* to report thirty minutes each day in advance of going on patrol duty for roll call, inspection, assignment of beats, and orders are "preliminary" or "postliminary" activities. On the contrary, the following authorities demonstrate that such activities must be regarded as "principal" activities of these employees and therefore within the terms of their contract for compensation.

The best analogy—and one bearing directly upon this issue—is the use made by Congress of the terms "pre-

liminary” and “postliminary” activities in Section 4 (a) of the Portal-to-Portal Act as follows:

“SEC. 4. RELIEF FROM CERTAIN FUTURE CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT AND THE BACON-DAVIS ACT.—

“(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay to employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act.—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) *activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.*”

It is recognized that section 4 deals with “future claims” and that section 2, on “existing claims,” makes no reference to the terms “preliminary” and “postliminary” activities. It is nevertheless submitted, however, that the meaning of these terms has a controlling influence in this case for two reasons:

(1) That despite the distinction in the Act between "existing" and "future" claims, the legislative history of the Act shows clearly that there was no intention of barring employees from compensation for their "principal" activities within the scheduled work-day, even as to "existing" claims and that the requirements of the Fair Labor Standards Act were not changed in any way in that respect.

(2) That, regardless of the holding of this court as to reason (1), if the activities here in question were not "preliminary" or "postliminary" they were compensable under the contract of employment, under the finding of the Court, in effect, that the company promised to pay for all of the principal activities of the guards, an intent made clear by the phrase "as distinguished from any preliminary or postliminary activities in connection therewith."

We thus turn to the intention with which Congress employed these terms.

In Senate Report No. 48, 80th Congress, 1st Session, p. 48, although under the heading "Future Portal-to-Portal Claims," the following statement appears:

"It will be observed that the particular time at which the employee commences his principal activity or activities and ceases his principal activity or activities marked the beginning and the end of his workday. The term "principal activity or activities" includes all activities which are an integral

part thereof as illustrated by the following examples:

“(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

“(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

* * *

“Any activity occurring during a workday will continue to be compensable or not compensable in accordance with the existing provisions of the Fair Labor Standards Act.”

In the debate on the Portal-to-Portal Act in the Senate, the following statement was made by Senator Cooper, as quoted in the Congressional Record, 80th Congress, 1st Session, p. 2375:

“Mr. COOPER. Reverting again to future claims, I repeat that *as to the period which we might call the scheduled workday, from the commencement of the principal activity until it is completed, the committee bill does not legislate. Every right that a worker has secured under the Fair Labor Standards Act up to the Mount Clemens decision is preserved to him.* I believe that the distinguished Senator from Rhode Island would agree with the statement I have just made.

“There is one other area in which it could be argued that the committee bill might deprive a worker of some right which he has earned or which has been accorded to him under the Fair Labor Standards Act, and that is in a determination or definition of the words “principal activity.” I will give an example. Before the enactment of the Fair Labor Standards Act an employee might have worked upon a lathe under a contract, and his contract may have provided that his pay should commence at a scheduled hour, say at 7 o’clock when the lathe began to run, and he began to apply his energy to a casting or to a clock upon the lathe. After the enactment of the Fair Labor Standards Act, by interpretations of the Wage and Hour Administrator, it was held that certain preparatory activities such as sharpening tools, oiling the machinery, preparing his machinery for work, were so closely related to his productive activity that the employer must compensate the employee for it. We believe that *in the use of the words ‘principal activity’ we have preserved to the employee the rights and the benefits and the privileges which have been given to him under the Fair Labor Standards Act*, because it is our opinion that *those activities which are so closely related and are an integral part of the principal activity, indispensable to its performance, must be included in the concept of principal activity*. And to make our position clear we have given examples in the report.”

Further support and clarification for this position appear in an “Interpretation Bulletin” issued November, 1947, by the United States Department of Labor, entitled “General Statement as to the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938.” Title 29, Chapter V, Code of Federal Reg-

ulations, Part 790. The Supreme Court of the United States has held that such administrative interpretations, although not binding, are entitled to persuasive weight. *United States v. American Trucking Assn.*, 310 U. S. 534; *Skidmore v. Swift & Co.*, 323 U. S. 134. On pages 11 to 13 of this bulletin the following statements appear:

“Where, however, an employee is *required by his employer to report at a particular hour at his work-bench or other place* where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee’s principal activities. The difference in the two situations is that in the second *the employee was engaged to wait* while in the first the employee waited to be engaged.

* * *

“(a) An employer’s liabilities and obligations under the Fair Labor Standards Act with respect to the ‘principal’ activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, an time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted. But before it can be determined whether an activity is “preliminary or postliminary to (the) principal activity or activities’ which the employee is employed to perform, it is generally necessary to determine what are such ‘principal’ activities. The use by Congress of the plural form ‘activities’ in the statute makes it clear that in order for *an activity to be a ‘principal’ activity*, it need not be predominant in some way over all other activities engaged in by the employee in performing his job; rather, *an employee may*, for purposes of the Portal-to-Portal

Act, *be engaged in several 'principal' activities* during the workday. The 'principal' activities referred to in the statute are activities which the employee is 'employed to perform';

* * *

"The legislative history further indicates that Congress intended the words 'principal activities' to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed. A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered 'sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work.'

"(b) *The term 'principal activities' includes all activities which are an integral part of a principal activity.* Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal bill. They are the following:" (Quoting examples set forth in Senate Report No. 48, set forth above)

* * *

"*Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.*

(c) Among the activities included as an integral part of a principal activity are *those closely related activities which are indispensable to its performance.* If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity."

Clearly, in this case, the activities of plaintiffs in appearing at a specified and required time for roll call, inspection, assignment of beats, and orders of the day were an "integral" part of their duties as guards and were "indispensable" to the performance of such duties. Otherwise how would they know what beat to take or what specific orders of the day to follow in performing their duties as guards? Obviously, the guards could not have performed their patrol duties without these assignments and orders.

As pointed out above, to be a "principal" activity it need not be predominant and there may be several "principal" activities. Here the plaintiffs were not "waiting to be engaged," but were "engaged to wait" and were "employed to perform" the activities in question. Moreover, since plaintiffs were required, under penalty of discharge, to report at a specified time and place each day for these purposes, it must be said that their "workday" began at that time and place. It follows that previously existing provisions of the Fair Labor Standards Act apply to this case and that there was no intent in adopting the Portal-to-Portal Act to change the application of such provisions in a case such as this.

This conclusion is corroborated by the recent publication "The Portal to Portal Act of 1947", Bureau of

National Affairs, 1947, p. 39, as follows :

“One preliminary activity which has led to considerable litigation recently is standing roll call and receiving instructions in the case of plant guards. Several courts have ruled that such time must be included in overtime computations under the Wage-Hour Law. (Bartlett v. General Motors Corp., 6 Wage and Hour Cases 699; Yellow Truck & Coach Mfg. Co. v. Edmondson, 6 Wage and Hour Cases 56; Blazier v. Western Pipe & Steel Co., 6 Wage and Hour Cases 636). It would appear that such activities of plant guards might continue to be compensable under the Portal-Pay Act as part of their ‘principal activity.’ ”

One of these cases, the *Blazier* case, was decided by Judge Yankwich and is otherwise referred to as Case No. 5727-Y, D.C., S. D. Cal. The *Bartlett* case is unreported officially, but was decided by Judge Koscinski, Case No. 4802, (D.C.E.D. Mich.). The *Yellow Truck* case by the Circuit Court of Appeals, Sixth Circuit, is reported in 155 F (2d) 367, and states that the appellant conceded, “as indeed it must, that such time spent by guards was working time for the purposes of the Fair Labor Standards Act.” These decisions, as well as the early position taken in 1940 by the U. S. Department of Labor that all time that an employee is required to be on duty or at a prescribed place is to be included as working time further supports the conclusion that Congress, in adopting the Portal-to-Portal Act, never intended to change this well established rule and practice.

But even assuming a contrary intent by Congress, which plaintiffs strongly deny, since the contract of employment in this case was, in effect, to pay for the principal activities of the plaintiffs, *as distinguished from any preliminary or postliminary activities in connection therewith,*” it follows that since these activities were not “preliminary or postliminary,” they were compensable under the contract of employment in this case.

C. THE PORTAL-TO-PORTAL ACT HAS NO APPLICATION IN THIS CASE FOR THE FURTHER REASON THAT THE CONTRACT OF EMPLOYMENT AT HOURLY RATES, WITH TIME AND ONE-HALF FOR OVERTIME, REQUIRED THAT PLAINTIFFS BE COMPENSATED FOR THE TIME SPENT IN THE ACTIVITIES IN CONTROVERSY, ALTHOUGH NOT PAID FOR IN THE PAST.

It is important to bear in mind in this case that while plaintiffs were not organized and had no written collective bargaining agreement, (Tr. 87) they were paid at hourly rates, with time and one-half for work in excess of eight hours per day or forty hours per week. (Tr. 76-77) They had not, however, been paid for the thirty minutes each day spent in roll call, inspection, assignment of beats and orders of the day, (Tr. 78) although they were required, under penalty of discharge, to be present during that time and for those purposes.

The question is thus presented whether, under these circumstances and under the facts of this case, the em-

ployment contract, being one for employment at hourly rates, with time and one-half for overtime, requires compensation for the time spent in these activities, despite the fact that no such compensation had been paid in the past.

We therefore respectfully direct the attention of this Court to the recent decision by Judge Yankwich in the case of *Devine v. Joshua Hendy Corp.*, April 30, 1948, No. 6176-Y (D.C.S.D. Calif.) 7 W.H. Cas. 936. That case involved a claim for back wages by so-called "lead-men" and foremen employed under a contract providing for hourly rates, with time and one-half for overtime. No payment had been made for time spent in advance of their regular shifts in consulting with foremen on the previous shifts and in laying out work for their crews. The Court stated that :

"It is true that there was no direct promise to pay. But the contract with the union implies a promise to pay for all work that is required to be done, either before or after the regular eight-hour period." (Id., p. 945)

Accordingly, recovery was allowed.

Attention is likewise directed to the recent case of *Frank v. Wilson & Co., Inc.*, 14 C.C.H. Labor Cases, Par. 64, 296, (N.D. Ill., 1948) in which Judge Igoe had a similar claim before him under a contract of employment at

hourly rates, with time and one-half for overtime. In that case the employees were employed in the defendant's mechanical division with scheduled working hours of 8 A. M. to 12 Noon, and from 12:30 P. M. to 4:30 P. M. The defendant required all employees to be dressed in working clothes prior to punching the time clock, and to punch the clock before commencing work. A rule of the defendant required the employees to be dressed and ready to go to work at 7:55 A. M., five minutes before the start of the shift. They were paid only for the time following 8 A. M. The employment contract provided, as did the one here, for a basic workday of eight hours, and a basic work-week of forty hours, and that all time worked in excess of those hours would be paid for at the rate of time and one-half. The court held that the five minutes during which the employees were required to be at their place of employment before their shift started were compensable within the meaning of the Portal Act by the terms of the written contract between the parties, and also by virtue of custom and practice, although the employees had never been paid for that time.

See also *Marchant v. Sands Taylor & Wood Co.*, 75 F. Supp. 783, 787, in which a similar result was reached for employees paid on a weekly salary.

The plaintiffs in this case were employed at hourly rates. This, in itself, is an agreement to pay such rates

for each hour or part of an hour spent by the employees in duties for which they were engaged. This agreement, coupled with the express written instructions and orders by defendant Kaiser Company to report for work at a specified time and place was, we submit, an agreement of the type contemplated by Section 2 of the Act to compensate plaintiffs at such hourly rates for all time spent by plaintiffs thereafter until the end of their respective shifts.

What defendants would ask the Court to hold is that before an employer would be liable for an existing claim on a theory of contract to pay he must have, in his contract with his employees, specified each type of overtime work that was to be paid for and that this failure to do so would relieve him from all existing claims for overtime compensation based on the contract of employment, even though the employer *required* his employees to engage in such unspecified activities. Surely nothing could be more removed from the realities of the industrial world. As this Court well knows, virtually the only common type of contract which provides for overtime compensation is the type that specifies an hourly rate, with time and one-half for all overtime work, without specification of each possible type of overtime work. Surely, then, such a contract must satisfy the requirements of Section 2 of the Act. It follows that since the claims of

this case were compensable under such a contract they are not barred by Section 2 of the Portal-to-Portal Act.

D. THE PORTAL-TO-PORTAL ACT HAS NO APPLICATION IN THIS CASE FOR THE FINAL REASON THAT THERE WAS AN IMPLIED, IF NOT EXPRESS, CONTRACT TO PAY FOR THE ACTIVITIES IN CONTROVERSY.

While fully recognizing the reference in Section 2 of the Portal-to-Portal Act to the term "express provision" of a contract, we respectfully direct attention to the recent decision of Judge Duncan in *Conwell v. Central Mo. Tel. Co.* (W.D. Mo. W.D.) 74 F. Supp. 542. In that case the plaintiffs were two night telephone operators working on eleven-hour night shifts, receiving pay for eight hours (later nine and one-half), the balance being designated as sleeping time. The switchboards were busiest in the first half of the shift, tapering off toward morning. Sometimes the plaintiffs had two or three hours without interruption during which they slept. Other times they were disturbed too frequently to sleep. They could not leave their posts and had to attend to whatever calls came in. The practice of not paying for the three hours designated as sleeping time had continued for about twenty years. The court gave judgment for all of the unpaid "sleeping time". In reaching this decision the Court stated at pages 544-545:

"If defendant is correct as to the legislative intent, then no person other than the organized groups whose compensation and working hours and con-

ditions are fixed by working agreements would be able to enforce his right to overtime pay for time actually and legitimately earned under the Fair Labor Standards Act prior to the passage of the Portal-to-Portal Act.”

* * *

“Senator Ferguson, a member of the Judiciary Committee, who actively participated in the preparation and passage of the Portal-to-Portal Act, in discussing the extent to which the proposed bill destroyed existing causes of action, used the following language :

“ ‘I answer by saying that it is the intent of the section referred to abolish every known claim that could exist under the Fair Labor Standards Act (29 U.S.C.A. Sec. 201 et seq.) the Walsh-Healey Act (41 U.S.C.A. Sec. 35 et seq.) or the Bacon-Davis Act (40 U.S.C.A. Sec. 276a et seq.)—specifically under the acts and by virtue of nothing else than the acts, except claims which may arise under any express or implied contract. It wipes out all claims that are specifically provided for in the acts referred to. I think it was the intention of the drafters of the legislation to wipe out everything under those acts that was not based upon contract or custom or practice. That was the intention.’ ”

“This statement seems to agree with the statements of most other Senators who discussed the matter. It would, therefore, seem that it was the intention of the Congress to wipe out every existing claim except those that had arisen under contract written or unwritten, *express or implied*, or pursuant to custom or practice.

“It must be observed, however, that the Senator used the expression or the phrase ‘*express or implied contract*.’ Senator Ferguson is recognized as a profound lawyer. He was an outstanding judge prior to his election to the United States Senate. I am sure his words were not used lightly and without

consideration. It is difficult to conclude that the Congress of the United States intended to deny jurisdiction of the Court over legitimate claims of employees who had actually worked many hours in excess of 40 hours permitted by the Fair Labor Standards Act. Nowhere was it insisted during the consideration of the Act that such claims were unfair or unjust or outside the scope of the Fair Labor Standards Act, nor were there any expressions indicating a desire to destroy any such claims, or the jurisdiction of the Court with respect thereto except insofar as it was necessary to deny jurisdiction with respect to the portal-to-portal pay cases which were not seeking compensation for actual services rendered for productive labor, but for traveling and waiting time and for other activities outside actual productive activities.”

The general law and the law of Oregon (which governs the contract in this case) is well stated in *Roberts v. Gerlinger*, 124 Or. 461, 467, as follows:

“Where one performs for another, with the other’s knowledge, a useful service of a character that is usually charged for, and the person for whom the service is performed expresses no dissent or avails himself of the service, a promise to pay the reasonable value of the service is implied: 6 R.C.L., p. 587, Sec. 6.”

To the same effect, as stated in *Le Mieux Bros. v. Tremont Lbr. Co.*, 140 F (2d) 387 (CCA 5th), at page 389:

“It is the universal rule in States having a common-law background that where one renders services to another at the request of the latter there arises an implied contract to pay the servant the reasonable

value of those services. An implied contract is as binding as an expressed contract, and has as its origin, or base, the agreement between the parties. The law operates on the agreement as distinguished from becoming a part of the agreement.”

See also *Page on Contracts*, Vol. 3, (2d Ed.), Sec. 1442, as follows:

“If the services are rendered at the request of the person for whom they are rendered *or if the benefits thereof are accepted voluntarily by such person* there is an implied promise on his part to make reasonable compensation therefor if no express contract has been made; if the services are such as are ordinarily paid for and if the party who rendered them was not bound to render them without compensation.”

It is likewise established law that recovery may be had on the basis of implied contract for extra work or services outside the contract, but performed in connection therewith, when rendered at the expressed or implied request of the other party and when performed with his knowledge and consent. 17 *C.J.S. Contracts*, Sec. 364; 13 *C.J. Contracts*, sec. 588, p. 585.

In this case, of course, it was both with the knowledge and request of defendant Kaiser Company that plaintiffs reported thirty minutes in advance of their patrol duty for roll call, inspection, assignment of beats and orders. Clearly these services were of a useful nature to

the company or it would not have required them, under penalty of discharge. It is equally clear that these services were of a character usually charged for, since both under the Fair Labor Standards Act since the release of Interpretative Bulletin No. 13, *supra*, and by general industrial practice, where an employee is *required* to report at a specified time and place on his employer's premises, all time spent and services performed by him thereafter are usually regarded as time worked, to be charged and paid for. At least plaintiffs were not bound to render these services without compensation. Thus the requirements of the *Roberts* and *Le Mieux* cases are clearly satisfied, as well as the requirements specified by *Page on Contracts*, *supra*.

Furthermore, if defendants should maintain their position that the contract of employment in this case contemplated payment only for actual guard duties, and not for the activities in question, then these activities constituted extra work outside the contract, but performed in connection therewith at the express request of the employer and with his knowledge and consent, with the result that plaintiffs are entitled to recover for these activities on the basis of implied contract, under the above quoted rules.

Finally, if, on the contrary, defendants should take the position, as previously contended herein by plain-

tiffs, that the contract of employment in this case was for payment solely for the principal activities of the plaintiffs, as distinguished from preliminary or postliminary activities, then the activities in question, being principal activities, as demonstrated above, are compensable by express contract, with the result that these claims are not barred by section 2 of the Portal-to-Portal Act.

E. IF DEFENDANT CONTENDS THAT PLAINTIFFS HAVE BEEN PAID IN FULL FOR ALL TIME WORKED, INCLUDING THE ACTIVITIES IN QUESTION, THEN THE LAW REQUIRES ADDITIONAL ONE-HALF TIME PAY FOR ALL SUCH TIME OVER FORTY HOURS IN ANY WEEK.

If the Court should reject plaintiff's contention that they have been paid nothing for the time in question, and if, as appears to be the case, defendants should take the position that wages already paid to plaintiffs fully compensated them for all time worked, including the time spent in the activities in question, there would still be an issue whether they have been paid for such activities not only straight time rates, but also additional half time as the overtime compensation required under the Fair Labor Standards Act.

To illustrate: X employee worked eight hours each day for six days a week on patrol duty—or a total of 48

hours. He also spent 30 minutes each day in reporting for roll call, inspection, assignment of beats, orders of the day—or three additional hours, making a total of 51 hours. He was paid \$52.00 per week, computed at \$1.00 per hour for 40 hours and \$1.50 per hour for eight hours of overtime.

If defendant should now contend that the \$52.00 paid for the week also included payment for all 51 hours of work, then it would follow that although the employee had been paid additional overtime compensation for the first eight hours in excess of 40 hours per week, as required by the Fair Labor Standards Act, he has been paid only at straight time, but not at time and one-half, for the additional three hours spent in the activities here in controversy.

Since, therefore, under such a contention, there would have been at least a custom, if not a contract, to pay for these three hours at straight time, section 2 of the Portal-to-Portal Act would not relieve the employer from liability and the usual requirements of the Fair Labor Standards Act would remain applicable. Under these requirements the employer would be liable to pay an additional one-half time for these three hours whenever they resulted in work in excess of 40 hours in any week.

The formula for computing the additional payment would be as follows—using the example cited above: If X had been paid \$48.00 straight time pay for 51 hours' work, his hourly rate would be \$.94 per hour. He would then be entitled to additional one-half time pay at \$.47 per hour for the 12 hours in excess of 40 hours in the week or a total of \$5.64. He has already been paid \$4.00 as overtime compensation for eight hours in excess of 40 hours in the week. Thus, he would still be entitled to receive the difference of \$1.64 for the week as the additional overtime compensation not yet paid for the three hours in question.

It is, of course, the position of plaintiffs that they have been paid *nothing* whatever for the activities in question and are entitled to full payment at time and one-half for that time—or, to use the example above, to be paid for three hours at \$1.50 per hour, making a total of \$4.50 additional pay due for the week. But if the Court should reject this contention it would appear that plaintiffs would at least be entitled to be paid additional one-half time pay for the three hours spent each week in the activities in question for the reason that it appears to be defendant's position that plaintiffs have already been paid for the time spent in these activities. But such payment was, at the most, at only straight time rates.

II. IF THE PORTAL-TO-PORTAL ACT HAS APPLICATION TO THE FACTS OF THIS CASE, THEN SAID ACT IS UNCONSTITUTIONAL AS APPLIED TO SUCH FACTS.

It must be conceded, of course, that most of the courts which have passed upon the question have upheld the constitutionality of the Portal-to-Portal Act *as applied to the facts involved in those cases*. These decisions have, in the main, been based upon four principal grounds:

(a) That claims for overtime compensation are not vested property rights, but are statutory rights which can be destroyed at the pleasure of Congress without constitutional inhibitions;

(b) That even if such claims constitute vested property rights, such rights are subject to the power of Congress to limit or destroy under its power to regulate interstate commerce;

(c) That the jurisdiction of the federal district courts is wholly statutory and may thus be withdrawn completely, thus removing the means for enforcement of such claims without constitutional inhibitions; and

(d) That the Act does no more than to validate contracts which may have been illegal when made, which is within the constitutional power of Congress.

It must be further conceded that if any one of these grounds as applied to the facts of this case is valid, then the Act is constitutional. It is the position of appellants, however, not only that the prohibitions of the Act do not apply to the facts of this case, for the reasons stated above, but that, if so applicable, then the Act is unconstitutional insofar as it is applied to the facts of this case. In support of this position appellants contend, as stated below in more detail, that the more recent and better reasoned decisions on the constitutionality of this Act make it clear that each of the four grounds stated above is either too broadly stated or is subject to qualifications which are peculiarly applicable to the facts of this case.

A. THE CLAIMS OF PLAINTIFFS IN THIS CASE ARE NOT PURELY STATUTORY RIGHTS BUT ARE VESTED PROPERTY RIGHTS, AND EVEN IF STATUTORY RIGHTS CANNOT BE COMPLETELY DESTROYED.

Despite decisions to the contrary, it is submitted that the correct view as to the nature of claims for overtime compensation under the Fair Labor Standards Act is that expressed in a recent and most scholarly discussion of this subject by Judge Driver in *Miller v. Howe Sound Mining Co.*, (E. D. Wash.) decided May 11, 1948, and as yet not officially reported, but to be found in 8 W. H. Cas. 1. In that case Judge Driver, after quoting many decisions to support his position, held as follows on this point:

“ . . . plaintiff’s claims to overtime pay, although arising out of the Fair Labor Standards Act, are compensatory and quasi-contractual, vested property rights, such as would usually be within the protection of the due process clause.”

To a similar effect see the comprehensive analysis of this Act in “Constitutionality of the Portal-to-Portal Act”, 47 *Col. L. Rev.* 1010, at 1015 and 1021. To the same effect see *Fletcher v. Grinnell Bros.*, 64 F. Supp. 778, 780; *Reid v. Solar Corp.*, 69 F. Supp. 626, 637. This, of course, is in accord with the general proposition that a vested statutory cause of action is property. *Pritchard v. Norton*, 106 U. S. 124, 132; *United States v. Standard Oil Co. of Calif.*, 21 F. Supp. 645, 661; aff’d 107 F. (2d) 402 (CCA 9th); c. d. 84 L. ed. 1003, 1019.

But even if, as held by some courts, such claims are wholly statutory, it does not follow, as some cases have held, that Congress may with impunity destroy such rights by retroactive legislation. Thus, as pointed out in 47 *Col. L. Rev.* 1010, at 1013:

“It has been argued that the due process clause does not protect against retroactive destruction of rights created by statute since they are not vested. But the decisions fail to support the distinction between statutory rights and vested rights since legislation retroactively eradicating statutory causes of action has been both upheld and invalidated under the 14th Amendment. An analysis of the cases dealing with such legislation reveals that the nature of the claim, rather than the fact that it was statutory, has been the determinative factor.”

This article then discusses the cases on the subject and reaches the conclusion that when statutory liability has been imposed for *compensatory* purposes retroactive laws have been held invalid and that claims for overtime compensation under the Fair Labor Standards Act are compensatory in nature. (Id. 1014, 1015) To the same effect see "The Portal-to-Portal Act of 1947", 34 Va. L. Rev. 26 at 35-36 and 53.

That claims under the Fair Labor Standards Act are compensatory in nature is firmly established by the case of *Overnight Motor Transp. Co. v. Missel*, 316 U. S. 572, 583. Decisions holding other rights based on statutes to be compensatory and therefore immune from retroactive legislation include: *Ettor v. Tacoma*, 228 U. S. 148; *Coombes v. Getz*, 285 U. S. 434 and *Steamship Co. v. Jolliffe*, 2 Wall. 450; 17 L. Ed. 805.

Consider now the nature of the claims in this case. These are not claims for compensation for time spent in walking to work or in other activities of a purely "preliminary" or "postliminary" nature, as those terms have been defined, as discussed above. In such cases the employees were not requested or required to report at any given time and place and such activities were all engaged in *before* the time when they were required to report for work. It is thus understandable why some courts have held that claims for such activities are "wholly

statutory” and not compensatory in nature, although appellants do not agree with the soundness of such decisions.

In this case, however, plaintiffs were *required* to report at a given time and place. All of the activities in question were performed *after* that time. These activities were not of a “preliminary” or “postliminary” nature, but were among the “principal” activities of the plaintiffs, because indispensable to the performance of their patrol activities. Finally, there was a liability on the basis of implied contract for such activities, since performed at the request of the employer, even if it be held that an implied contract does not satisfy the requirements of Section 2 of the Act.

Therefore, it is submitted that under these circumstances claims for compensation for such work constitute vested contractual or property rights which are protected from retroactive destruction by statute and that even if such claims be regarded as constituting no more than a statutory right, which appellants strongly deny, the claims under these circumstances must clearly be regarded as compensatory in nature and that their destruction by retroactive legislation is therefore prohibited.

B. EVEN RIGHTS SUBJECT TO THE COMMERCE POWER ARE PROTECTED BY THE GUARANTY OF DUE PROCESS OF LAW, WHICH WOULD RENDER THE PORTAL-TO-PORTAL ACT AS UNCONSTITUTIONAL IF APPLIED TO THE FACTS OF THIS CASE.

Several decisions in upholding the constitutionality of the Portal-to-Portal Act have inferred that since the statute is an exercise of the commerce power, even vested contract or property rights can be destroyed retroactively with impunity. In the only circuit court decision to pass directly on this question, however, it was held by Judge Parker in *Seese v. Bethlehem Steel Co.* (CCA 4th) decided May 5, 1948, and still unreported officially, although reported in 7 W. H. Cas. 989, that even the exercise of the commerce power is subject to the guarantee of due process of law and that

“Not even in the exercise of the commerce power may Congress take one man’s property and give it to another or arbitrarily strike down rights arising under contract, . . .”

The decision went on to hold, however, that claims for time spent in changing clothes and walking to work *before the time required to report for work* might be taken away by Congress without violation of due process of law.

Likewise, Judge Driver in *Miller v. Howe Sound Mining Co.*, supra, held that the commerce clause is subject to the guarantee of due process in the Fifth Amend-

ment, that the only remaining question was whether the Act was unreasonable, arbitrary and capricious, and that plaintiff had the burden of proving such to be the case. In that decision, however, the exact nature of the activities involved did not appear and the sole question was the validity of the complaint.

To the same effect, see 47 *Col. L. Rev.* 1010, *supra*, at 1017-1018, citing many cases:

“It has been suggested that property rights, despite the usual protection of the Fifth Amendment, may be eradicated by an exercise of the Congressional power to regulate interstate commerce. This suggestion is based upon an interpretation of statements often made by the Court in sustaining statutes enacted under the interstate commerce power. Such an interpretation is not only contrary to the highest judicial opinion, but also is repugnant to the most basic constitutional principle—that laws enacted pursuant to one of the powers conferred on the federal government must conform to the inhibitions of other clauses of the Constitution. An examination of the cases in which such statements have usually appeared reveals that the legislation involved merely restricted the prospective ‘freedom of contract’ of the individual affected. In other instances, the statute prevented the completion of an executory contract, or altered the organizational form of an economic relationship. When an accrued cause of action has been at stake, the statute merely postponed the time for prosecution of the claim or withdrew but one of several remedies for its enforcement. In no situation, however, did the Court completely deny relief to one whose underlying cause of action had accrued. Examined in this light, the dicta seem only to restate in another form the

familiar proposition that, when Congress has power to legislate on a certain subject, the validity of the statute under the due process clause will depend upon its reasonableness.”

And, later, at pages 1020-1021 :

“In the light of these facts, the final question is whether the legislation is in the realm of arbitrary action or within the limits of Congressional discretion. The answer to this question depends upon the Court’s determination of whether the economic, political, and social consequences inherent in the deprivation of employees’ claims for accrued compensation outweigh by far the beneficial effects of relieving employers from liability. The Portal-to-Portal Act has answered this question in the negative, and, in the past decade, the Congressional solution to economic questions has been accepted. However, the very novelty of the legislation may affect its validity. This is probably the most outright instance in which potential property has been taken from one specific class, employees, and has been given by the legislature to another, their employers. Whereas a statute is not necessarily deemed arbitrary because it incidentally works a hardship on one group while benefiting another, the previous limits of Congressional power to effect such a result for economic reasons may well have been surpassed by the tremendous consequences accomplished by this Act.”

Therefore, one of the important questions before this Court is whether the Portal-to-Portal Act, if applied to bar claims for the activities involved in this case, would be unreasonable, arbitrary and capricious, and therefore unconstitutional *insofar as applicable to the facts of this case*.

Here again it is important to bear in mind that this is not the usual "portal-to-portal" type of case involving walking time or other activities before the time at which employees were required to report for work. The great bulk of the cases sought to be outlawed by the Portal-to-Portal Act and which were regarded as involving "windfalls" to employees under the *Mt. Clemens* decision were clearly of that character and even the economic aspects of those cases has been exaggerated. 47 *Col. L. Rev.* 1010, *supra*, at 1020. As to such cases, however, it may be assumed with some plausibility that the action of Congress was not unreasonable, arbitrary or capricious.

This case, however, involves a claim for *activities following the time when plaintiffs were required by written orders to report at a specified place*—thereby falling within the definition of "time worked" at least since the issuance of Interpretative Bulletin No.13, *supra*, in 1940. The case was filed on January 17, 1948, months before the decision in the *Mt. Clemens* case, on June 10, 1946. The activities involved are among the principal activities of the employees, as heretofore demonstrated and as distinguished from "preliminary" or "postliminary" activities, as were involved in most of the "portal-to-portal" cases. In any event, there was an implied contract to pay for these activities, based on express request of the employer, and even if such an implied contract does not satisfy the terms of the Portal-

to-Portal Act, it creates an obligation which cannot be destroyed retroactively under the due process clause.

It is therefore submitted that even if the language of Section 2 of the Portal-to-Portal Act be interpreted as broad enough to foreclose existing claims for compensation for such activities, which appellants' strongly deny, it would be wholly unreasonable, arbitrary and capricious to bar retroactively all existing claims for compensation for such activities where facts and circumstances exist such as are presented in this case. It follows that the Act must either be construed in a way so as to avoid unconstitutionality, i. e., as not applicable to the facts of this case, or else must be held unconstitutional insofar as it applies to such facts.

C. TO WITHDRAW JURISDICTION OF BOTH STATE AND FEDERAL COURTS TO GRANT COMPENSATION FOR THE ACTIVITIES INVOLVED IN THIS CASE WOULD BE TO DESTROY THE RIGHT OF COMPENSATION ITSELF AND WOULD VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Despite decisions to the contrary, it is respectfully submitted that the sound rule on the question of withdrawal of jurisdiction from the courts over such cases is that stated by Judge Driver in *Miller v. Howe Sound Mining Co.*, supra, as follows, after citation of authorities:

“It is my conclusion that Congress can not destroy constitutionally protected property rights by the

expedient of withdrawing jurisdiction from every Court in which suits for their enforcement could be brought.”

He therefore concludes that the validity of the Act depends upon whether Congress by section 2 (a) of the Act can *directly* relieve employers from liability for such claims.

The same view is expressed in 47 *Col. L. Rev.*, 1010, *supra*, at 1021-1025, in which it is pointed out that *in previous decisions involving other statutes there was not a total destruction of all remedies whatever, in both state and federal courts*. It is there stated, at pages 1023-1024, in part:

“The Supreme Court has recognized the fact that the state legislature may make changes in the procedure a party must follow to enforce his right. But it has held that ‘a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy . . .’ That there exists a similar limitation on Congressional action has also been enunciated. Moreover, in instances where substantial remedial changes have been effected, the Court has been careful to point out that, had the right itself been diminished, a due process question would have been presented. It cannot be expected that the Court, which has so often in recent years discarded conceptualistic arguments in resolving important issues, will fail to recognize that it is a right rather than a remedy that is nullified by the Portal-to-Portal Act. Thus there is presented no problem different from that involved when a direct attempt to relieve employers from accrued statutory liability is made.”

and later, after discussing the various cases,

“If an analysis of all the cases concerning withdrawal of jurisdiction reveals anything at all, it is that a novel experiment has been attempted in the Portal-to-Portal Act, and what few precedents can be amassed are unfavorably disposed to its validity.”

An even broader objection is expressed in 34 *Va. L. Rev.* 26, *supra*, at 50-52, in contending that by removal of jurisdiction from the courts Congress “has assailed the one dangerous chink in the Fifth Amendment’s armor and thereby is guilty of a reprehensible lack of self-restraint.” Although conceding that the technique is effective, this article continues at page 52:

“... its use is certainly to be condemned and falls within the opprobrium attached to attempts to pack the Supreme Court. No less objectionable than those endeavors to upset the separation of powers is this present day tampering with the jurisdiction of the courts to avoid constitutional questions and a face to face conflict with substantive questions A strong argument can be made out against permitting the use of this device on the ground that congressional authority is both created and conditioned by the Constitution and that, while Congress has the power to limit the jurisdiction of the courts, it may not exercise the power if the effect is to violate the 5th Amendment.”

and, later, that this technique

“must be confined lest the independence of the courts be subjected to the rise and fall of the tides of public opinion. The passions of the hour must not

be permitted to evade constitutional safeguards by detour."

It is interesting to compare the comments of the learned trial judge in this case, (Tr. 93) although his conclusions, which were based on an earlier decision in *Boehle v. Electro Metallurgical Co.*, 72 F. Supp. 21, have been criticized in their failure to appreciate that the legislation involved in previous decisions on this question did not wholly destroy all available remedies. 47 *Col. L. Rev.* 1010, *supra*, at 1025.

In other words, the guarantee of due process applies to the exercise by Congress of all its powers, including its power to remove jurisdiction from the courts as well as its power over commerce. Therefore, as indicated in the *Miller* case, *supra*, and in 47 *Col. L. Rev.* 1010, *supra*, the real question on this issue is whether Congress could directly relieve employers from liability for such claims and thereby destroy the rights themselves. This, of course, involves the question of whether such a course of action is a valid exercise of the commerce power, or whether in the facts of this particular case, such an attempted exercise of this power would be unreasonable, arbitrary and capricious and would thereby violate the guarantee of due process of law. This question has been discussed above and it should require no repetition to demonstrate the unreasonable, arbitrary and capric-

ious effect of denying all relief to the plaintiffs under the facts of this case.

D. IN THIS CASE THERE CAN BE NO VALIDATION BY THE PORTAL-TO-PORTAL ACT OF A PREVIOUSLY INVALID CONTRACT NOT TO PAY COMPENSATION FOR THE ACTIVITIES HERE INVOLVED FOR THE REASON THAT THERE WAS NO SUCH CONTRACT AND, ON THE CONTRARY, IT WAS EITHER EXPRESSLY OR IMPLIEDLY AGREED THAT PLAINTIFFS WOULD BE COMPENSATED FOR SUCH ACTIVITIES.

In *Seese v. Bethlehem Steel Co.*, supra, it was suggested that all Congress did in the Portal-to-Portal Act was to validate agreements between employers and employees which were invalid under the Fair Labor Standards Act *by reason of its interpretation by the Supreme Court* of the United States and that Congress has power to validate retroactively contracts which were illegal when made. Cf. *Bateman v. Ford Motor Co.*, 76 F. S. 178, also referring to legalizing understandings which employers and employees had before the *Mt. Clemens* decision.

Such an argument may have some plausibility when applied to cases in which employees had engaged for a long period without additional pay in walking time and other similar activities *prior to the time when they were required to report for work*. It is clear, however, that such an argument can have no application to the facts of this particular case for at least three reasons :

(1) This is not a case in which the contract of employment was illegal because of interpretation of the Fair Labor Standards Act by the Supreme Court of the United States. Here, on the contrary, even if there was an agreement not to pay for the activities in question, which plaintiffs strongly deny for reasons appearing below, any such agreement was clearly illegal not solely by reason of decisions of the Supreme Court giving rise to the Portal-to-Portal Act, but on its very face, since the employees were *required* in writing to report at a given time and place, which clearly required payment for all subsequent activities by virtue of the base provisions of the Fair Labor Standards Act without necessity for judicial interpretation.

(2) In this case the contract of employment was for payment on an hourly basis, with time and one-half for overtime. It also provided for payment of all activities other than those of a "preliminary" or "postliminary" nature, and the activities in question were not of that nature, but, on the contrary, were among the "principal" activities of plaintiffs, all as demonstrated above. It follows that there was in this case no invalid contract not to pay for the activities in question to be validated by the Portal-to-Portal Act, as necessary under this theory of the case. Rather there was a valid contract which by its own terms required payment for these activities.

(3) Even if it be held that there was no such express contract as contended by plaintiffs, it is nevertheless true that the fact that the employer *required in writing* that plaintiffs report at a given time and place for roll call, inspection, assignment of beats and orders of the day is sufficient to *imply* a contract to pay for such activities, as demonstrated above, and even though such an implied contract be held insufficient to satisfy section 2 of the Portal-to-Portal Act, despite the authorities and arguments set forth above, an implied agreement at least is sufficient to negative any inference that there was an agreement *not* to pay for these activities, as necessary to sustain the constitutionality of the Act as applied to the facts of this case on the theory of validating a previously invalid contract.

CONCLUSION

Without repeating the summary of arguments which appears above, it is submitted that these arguments and the authorities in support of them have demonstrated that the prohibitions of section 2 of the Portal-to-Portal Act were not intended to and have no application to the peculiar facts of this particular case, which is not a "portal-to-portal" case in any true sense of the word, and that if the Act be construed as barring the claims of

this case then the Act is unconstitutional and void in-
sofar as it applies to the facts of this case.

Respectfully submitted,
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No. 11889

Docketed

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

C. T. POTTER, ET AL., APPELLANTS

v.

KAISER COMPANY, INC., APPELLEE

THE UNITED STATES OF AMERICA, INTERVENOR

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON**

BRIEF OF THE UNITED STATES AS INTERVENOR

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**In the United States Circuit Court of Appeals
for the Ninth Circuit**

No. 11889

C. T. POTTER, ET AL., APPELLANTS

v.

KAISER COMPANY, INC., APPELLEE

THE UNITED STATES OF AMERICA, INTERVENOR

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON*

BRIEF OF THE UNITED STATES AS INTERVENOR

STATEMENT

**(a) The nature of the case and interest of the United States
as Intervenor**

The appellants in the above action are or were employees of the appellee and sued for overtime compensation and liquidated damages under the Fair Labor Standards Act of 1938. Upon enactment of the Portal-to-Portal Act of 1947, the appellee invoked the provisions of that Act as defenses to the claims asserted and in opposition thereto the appellants, among other things, questioned the constitutionality of the Act. The United States District Court for the District of Oregon sustained the constitutionality of

the Portal-to-Portal Act and dismissed the action on January 21, 1948.

Pursuant to the Act of August 24, 1937, c. 754, § 1, 50 Stat. 751, 28 U. S. C. § 401, the United States has intervened in support of the constitutionality of the Portal-to-Portal Act. In view of the limited nature of the intervention, the Government in this case, as in others, takes no position as to any issues relating to the factual applicability of the Act beyond discussing the meaning of its sections to the extent deemed relevant to the constitutional questions.

While this brief deals primarily with the arguments that have been advanced by the appellants in this case, it is not confined to such arguments but covers as well all respectable related arguments which have thus far come to our attention in connection with litigation involving attacks upon the constitutionality of the Portal-to-Portal Act throughout the country. Accordingly, a mere reference to a contention that the Act is unconstitutional will not necessarily imply that the present appellants have advanced or rely upon it.

(b) The statutes involved

Pertinent excerpts from the Portal-to-Portal Act of 1947 (Act of May 14, 1947, Ch. 52, 61 Stat. 84, 29 U. S. C. § 251-262) and the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Ch. 676, 52 Stat. 1060; as amended, 29 U. S. C., § 201-219) appear at appropriate points in the brief, *infra*.

(c) Court decisions under the Portal-to-Portal Act of 1947

The constitutionality of the Act has been upheld by three United States Circuit Courts of Appeals¹ and by more than a hundred decisions of Federal District Courts.² With possibly two exceptions,³ we are aware of no decisions to the contrary. Although the Supreme Court of the United States has had occasion to remand two cases for reconsideration because of the enactment of the statute,⁴ no petition for certiorari involving the constitutionality of the Act has yet been filed.

ARGUMENT**I**

The portions of the Portal-to-Portal Act affecting monetary claims in existence at the time of its enactment are constitutional notwithstanding their substantive validity under earlier legislation

The portions of the Portal-to-Portal Act affecting existing claims under the Fair Labor Standards Act are Sections 2, 3, 6, 8, 9, 11, and 12. In the instant case, Section 2 of the Act is under attack. Since most of the arguments and authorities relating to the so-called "retroactive" changes made in the substan-

¹ *Rogers Cartage Co. v. Reynolds* (6 Cir.), 166 F. (2d) 317; *Seese v. Bethlehem Steel Co.* (4 Cir.), 168 F. (2d) 58; *Battaglia v. General Motors Corp.* (2 Cir., decided July 8, 1948), 8 WH Cases 108, 15 Labor Cases, par. 64,619; *Darr v. Mutual Life Insurance Co. of New York* (2 Cir., decided July 8, 1948), 8 WH Cases 124, 15 Labor Cases, par. 64,620.

² The reported District Court decisions are listed in the Appendix, *infra*.

³ *Sveltik v. Vultee Aircraft Corp.* (D. C., N. Tex.), 7 WH Cases 282, 13 Labor Cases, par. 64,063; *Curtis v. McWilliams Dredging Co.* (N. Y. City Ct.), 14 Labor Cases, par. 64,352, 7 WH Cases 757.

⁴ *Alaska Juneau Gold Mining Co. v. Robertson*, 331 U. S. 793; *Madison Ave. Corp. v. Asselta*, 331 U. S. 795.

tive law by these sections are applicable to each of them, all contentions advanced under this point in the brief would apply equally to the above sections, except where a contrary intention plainly appears.

1. The applicable provisions of the Portal-to-Portal Act are limited in operation to purely statutory claims

In view of the extravagant contentions as to the destructive effect of the Portal-to-Portal Act upon the rights of employees which have been advanced by those attacking the constitutionality of the Act, it seems well at the outset to examine briefly the nature of the claims affected by the legislation.

Section 6 of the Fair Labor Standards Act (29 U. S. C. § 206) requires every employer to pay to each of his employees who is engaged in commerce or in the production of goods for commerce not less than certain minimum wages. Section 7 of that Act (id., § 207) provides in part as follows:

(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * * [for a workweek longer than 44, 42 or 40 hours as the case may be] * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

For violations of the Act in respect of its minimum wage and overtime compensation provisions, Section 16 (id., § 216), in addition to criminal penalties, made employers civilly liable to employees as follows:

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. * * *

It is clear that, insofar as claims arising under the Fair Labor Standards Act are concerned, Section 2 of the Portal-to-Portal Act of 1947 was addressed exclusively to claims which came into being solely as a consequence of the enactment of Section 16 of the Fair Labor Standards Act.

Section 2 of the Act is, in relevant part, as follows:

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, * * * (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent, with a

written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, * * * in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, * * * to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

Section 2 plainly refers to liability arising “*under* the Fair Labor Standards Act of 1938 as amended.” [Italics supplied.]

It will be observed that Congress does not attempt in any way to interfere with the enforcement of claims other than those sought to be asserted *under* its prior legislation. Its provision is that “no employer shall be subject to any liability * * * *under* the Fair Labor Standards Act of 1938, as amended” [italics supplied]. Therefore, any claim which can be asserted independently of the prior legislation is, to that extent, not affected by the Act. Moreover, claims based upon activities which were compensable under express provisions of written or unwritten contracts, or by custom or practice, continue to be enforceable *under* Section 2 of the Act. Accordingly, there can be no merit to any contention that the Portal-to-Portal Act is unconstitutional because the claims that it purports to bar are contract claims.

That Section 2 was intended to affect only purely statutory claims is made evident not only by its language but by reference to the Congressional findings and policy in Section 1, in part, as follows:

The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices and contracts between employers, and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the result that, if said Act as so interpreted or claims arising under such inter-

pretations were permitted to stand, * * *
 (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; * * *.

By Section 2 of the Act, the Congress relieved employers of liability on claims asserted “*under the Fair Labor Standards Act*” [italics supplied], unless based upon activities which were *compensable* under either contract or custom. In other words the Congress was willing to decide, as a matter of legislative policy, that the liabilities affected by Section 2 of the Act were unexpected since the activities themselves had never been regarded as compensable. Cf. *Anderson v. Mt. Clemens Pottery Co.* (D. C. E. D., Mich., 1947), 69 F. Supp. 710, 712, 719-721. It is clear that it was the intention of the Congress to relieve employers of “unexpected liabilities” arising retroactively; in effect, as a consequence of subsequent interpretations of Congressional legislation.

In other words, if any such claim rests sufficiently upon contract that it may be enforced independently of the Fair Labor Standards Act, its enforcement in that manner is in no way barred by the Portal-to-Portal Act. However, it is clear that employers are relieved of liability on claims, which rest upon prior legislation, coming within the coverage of such sections unless the Congress, for some reason, lacks constitutional power to withdraw the support of earlier legislation.

2. The Portal-to-Portal Act is constitutional as an exercise of the plenary power of the Congress to withdraw and modify rights conferred exclusively by its prior legislation

As indicated above, by the Portal-to-Portal Act the Congress has not sought to disturb any claim to any extent that it does not rest exclusively upon its prior legislation in the sense that it would be valid apart from such legislation. In other words, any claim based upon contract, to the extent that it can be enforced in a contract action without reliance upon the Fair Labor Standards Act, can be enforced in such an action notwithstanding the provisions of Section 2, of the Portal-to-Portal Act. The Congress has found that the Fair Labor Standards Act has been interpreted so as to create unexpected liabilities under which employees would receive "windfall payments * * * for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay." (Sec. 1.) These are the claims that the Congress obviously intended to reach and to bar by the Act. As to employees such uncontracted for benefits were purely statutory⁵ and can be likened to statutory gratuities. As to employers such unexpected liabilities can be likened to statutory penalties.⁶

⁵ See, e. g., *Tennessee Coal Co. v. Muscoda Local*, 321 U. S. 590, 602-603; *Jewell Ridge Corporation v. United Mine Workers*, 325 U. S. 161, 167; *Brooklyn Bank v. O'Neil*, 324 U. S. 697, 704.

⁶ The civil liabilities to employees imposed by the Fair Labor Standards Act upon "Any employer who violates" its provisions (29 U. S. C. § 216 (b) had two distinct, if integrated, purposes, i. e., (1) to enforce its provisions relative to minimum wages and maximum hours (*id.* §§ 206 and 207) and (2) to provide for the payment of fair compensation to employees. Accordingly, while the benefits conferred upon employees are personal to them, they are nonetheless enforcement provisions of the Act which

Of course, the Congress may terminate statutory gratuities and penalties at any time. The mere repeal of a statute providing for penalties, without a saving clause, terminates prior liability thereunder. *Norris v. Crocker*, 13 How. 429, 440. See also, *United States v. Chambers*, 291 U. S. 217, 222-226 (and authorities there cited). And, in absence of contractual obligation, statutory gratuities may be withdrawn at any time at the will of the Congress. See and cf. *Norris v. Crocker*, *supra*; *Lynch v. United States*, 292 U. S. 571, 577 (and cases there cited).

As stated by the Supreme Court in the case of *Flanigan v. Sierra County*, 196 U. S. 553, 560:

The general rule is that powers derived wholly from a statute are extinguished by its repeal. *Sutherland on Statutory Construction*, § 165. And it follows that no proceeding can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act. 9 *Bacon's Abridgement*, 226.

Accordingly, it is clear that rights arising from and depending upon legislation alone may be terminated at the will of the legislative body.⁷ For this reason

could not be contracted away. See and cf., e. g., *Overnight Motor Co. v. Missel*, 316 U. S. 572; *Brooklyn Bank v. O'Neil*, 324 U. S. 697. Inasmuch as the benefits in question came as a "windfall" to employees, they may be regarded as pure statutory benefits subject to the further exercise of the legislative power that brought them into being—and, in respect of the enforcement aspects of the liabilities thus imposed upon employers, they obviously have all the attributes which make penalties equally subject to the legislative will.

⁷ See and cf. *Louisiana v. Mayor*, 109 U. S. 285, 287-288; *McNair v. Knott*, 302 U. S. 369, 372-374 (and cases there cited); *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, 311-312, 314-316; *In re Hall*, 167 U. S. 38, 42; *Cummings v. Deutsche Bank*, 300 U. S. 115, 124.

the United States Circuit Court of Appeals for the Sixth Circuit found Sections 9 and 11 of the Portal-to-Portal Act to be constitutional in *Rogers Cartage Co. v. Reynolds*, 166 F. (2d) 317, saying:

Sections 9 and 11 of the Portal-to-Portal Act are constitutional. Congress, in the exercise of its power to regulate interstate commerce, may interfere with valuable property rights. *North American Co. v. Securities & Exchange Commission*, 327 U. S. 686, 703; *American Power & Light Co. v. Securities & Exchange Commission*, 329 U. S. 90. While the rights given to employees under the Fair Labor Standards Act are substantial, they did not exist at common law, nor were they established by the United States Constitution. Since they are purely the creature of statute, they may be altered or abolished by the Congress which established them at any time before they have ripened into final judgment. Cf. *Western Union Telegraph Co. v. Louisville & Nashville Ry. Co.*, 258 U. S. 13; *Kline v. Burke*, 260 U. S. 226, 234. The constitutionality of the Act has been recently considered in various District Courts, and invariably upheld. Cf. *Boehle v. Electric Metallurgical Co.*, 72 Fed. Supp. 21.

For the same reason the Circuit Courts of Appeals for the Second and Fourth Circuits held that Section 2 of the Act is constitutional. *Seese v. Bethlehem*

The mere fact that a *statutory* claim or defense may be in litigation, either in the trial court or on appeal, does not remove it from the reach of legislation otherwise valid. Cf. *Carpenter v. Wabash Ry. Co.*, 309 U. S. 23, 26-27; *United States v. The Schooner Peggy v. Cranch*, 103, 108-110; *Western Union Telegraph Co. v. Louisville & Nashville Ry.*, 258 U. S. 13, 19-22. Cf. *Hodges v. Snyder*, 261 U. S. 600, 603-604.

Steel Co. (4 Cir.), 168 F. (2d) 58; *Battaglia v. General Motors Corp.* (2 Cir. decided July 8, 1948), 8 WH Cases 108, 15 Labor Cases, par. 64,619. In so ruling in the *Seese* case, the Court, among other things, said:

What was taken away was the right to recover on claims of purely statutory origin, claims given by statute not as compensation for labor performed but as a means of regulating wages and hours of work in interstate commerce. *Missel v. Overnight Transportation Co.*, 316 U. S. 572; *Brooklyn Savings Bank v. O'Neil*, 324 U. S. 697. Even where the contract clause is a limitation upon legislative power, it is universally held that such a claim may be taken away by the legislature without violation of constitutional right. Since the legislature may repeal its own act, it may take away that which has no existence save by virtue of that act. *Norris v. Crocker*, 13 How. 429; *Ewell v. Daggs*, 108 U. S. 143, 151; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646; *A. C. L. R. Co. v. Goldsboro*, 232 U. S. 548; *West Side R. Co. v. Pittsburg Const. Co.*, 219 U. S. 92; *National Carloading Corp. v. Phoenix-El Paso Express*, *supra*. The reason underlying the rule was stated by Mr. Justice Matthews in *Ewell v. Daggs*, *supra*, as follows:

“And these decisions rest upon solid ground.
* * * The more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains

in fieri, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract.”

Looked at in another way, all that Congress has done by the legislation here under consideration is to validate the contracts and agreements between employer and employee which were invalid under the Fair Labor Standards Act by reason of the interpretation placed by the Supreme Court upon that act; and the authority of the legislative body to validate voluntary transactions which at the time they were entered into were by statute invalid or illegal has been repeatedly upheld. *West Side R. Co. v. Pittsburgh Const. Co.*, 219 U. S. 92; *McNair v. Knott*, 302 U. S. 369, 372. In other words, the contracts of employment which contemplated that no payment should be made for the portal-to-portal activities but that these were to be compensated by the agreed wage, were invalid only because of the provisions of the Fair Labor Standards Act. There was nothing law or in reason which forbade Congress to give validity to these contracts retroactively, just as the invalid pledge of securities by National Banking Association was validated by retroactive legislation in the case of *McNair v. Knott*, *supra*.

Plaintiffs rely upon such cases as *Steamship Co. v. Joliffe*, 2 Wall. 450; *Ettor v. City of Tacoma*, 228 U. S. 148; *Coombes v. Getz*, 285 U. S. 434; and *Duke Power Co. v. South Carolina Tax Com'n*, 4 Cir. 81 F. 2d 513; but these cases are not in point. They were concerned

with vested property rights based on agreements and not on mere statutory provisions without contract or agreement to support them. * * *

Among the cases thus distinguished are those upon which chief reliance is placed by the appellants.⁸

However, in a number of the cases in which the constitutionality of the Portal-to-Portal Act has been challenged, the suggestion has been advanced that while the claims barred by Section 2 of the Act may not be contract claims in the pure sense, they nonetheless partake of the contract of employment because all contracts are entered into with implied reference to the existing laws bearing upon the contractual relationship. In the *Seese* case, *supra*, the Court answered this contention as follows:

It is argued that the provisions of the statute must be read into the contract of employment and that the right to recover compensation in accordance with its terms accrues upon the rendering of services. As stated above, however, the true situation with respect to claims affected by the Portal-to-Portal Act is that

⁸ In the *Ettor* case, for example, the existence of the statute reasonably tended to assure the property owner that he would be reimbursed for damage so that his failure to take protective measures, in *reliance* thereon, constituted a change of position in a contractual sense. (Cf. discussion of these cases in *McLaughlin v. Todd & Brown, Inc.*, D. C. Ind., 7 WH Cases 1014.) Here, however, the "rights" were wholly of statutory creation; were not given in substitution for either a contract or property right which otherwise would have been received or would have continued to exist; and "this is not a case where appellants' conduct would have been different if the present rule had been foreseen" (*Chase Securities Corp. v. Donaldson*, *supra*, 316).

that act validates the real contract between the parties and merely takes away a statutory remedy given by the prior act. Even if the provisions of the Fair Labor Standards Act be read into contracts of employment, so also must be read the constitutional power of Congress to change that act.

It is a predicate of the Act in question that there must have been no consciousness of intention on the part of the contracting parties that the amounts sued for should be paid. Accordingly, the only implied-in-fact agreement on the part of the employer and his employees, which could be said to have a bearing on the matter, would be their implicit agreement to comply with the provisions of the Fair Labor Standards Act as they might thereafter be interpreted by competent authority. However, it is unthinkable that an employer would have intended to bind himself to adhere to an adverse interpretation beyond the period of time that he was under legal obligation to do so.

Any suggestion that interpretations subsequently placed upon the Fair Labor Standards Act became irretrievable parts of each employment contract by force of law should be equally fruitless. "Not only are existing laws read into contracts in order to fix obligations as between parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 435.

No provision of the Fair Labor Standards Act required either implied or actual incorporation of its terms by parties to such a contract, as terms of the agreement, in such form that later congresses would be unable to alter the conditions of the employment relationship without abrogating the contract provisions.⁹ Any attempt on the part of one Congress so to tie the hands of a future Congress would obviously be open to most serious question on constitutional grounds. (See and cf., e. g., *Lynch v. United States*, 292 U. S. 571; *North American Com. Co. v. United States*, 171 U. S. 110, 137; *United Shoe Machinery Co. v. United States*, 258 U. S. 451, 463; *Boyd v. Alabama*, 94 U. S. 645, 650; *Stone v. Mississippi*, 101 U. S. 814, 817-818; *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 558.) Plainly no such result was intended and the Act cannot properly be given that effect. Cf. *Overnight Motor Co. v. Missel*, 316 U. S. 572, 577.

⁹ Bearing in mind the fact that Section 2 relieves employers of no liabilities, unless they were unexpected, it is evident that there is no basis for the application of cases holding that existing rights of enforcement, which have been appended to contracts by state law, and which were presumably known to and relied upon by the parties, become parts of the obligation of contracts which the states are forbidden to impair. See, e. g., *Coombes v. Getz*, 285 U. S. 434, 442; *Hawthorne v. Calef*, 2 Wall. 10, 22-23 (cf. *Ochiltree v. Railroad Co.*, 21 Wall. 249, 252-254); *Treigle v. Acme Homestead Assn.*, 297 U. S. 189, 194. Cf. *McCullough v. Virginia*, 172 U. S. 102, 122-125; *Marcus Brown Co. v. Feldman*, 256 U. S. 170, 198; *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 435; *Pritchard v. Norton*, 106 U. S. 124, 132, 136-137; *Chase Securities Corp. v. Donaldson*, *supra*, 315-316; *Von Hoffman v. City of Quincy*, 4 Wall. 535, 550; *Gibbes v. Zimmerman*, 290 U. S. 326, 332; *Vance v. Vance*, 108 U. S. 514, 518-522.

Accordingly, it is clear that insofar as rights given by the Fair Labor Standards Act have not, in fact, become terms of employment contracts they may be withdrawn by the Congress. Section 2 of the Portal-to-Portal Act of 1947, goes no further and is clearly constitutional.

3. The Congress had constitutional authority to abrogate the claims in question in order to accomplish legitimate public purposes through the exercise of its interstate commerce power

Even without its plenary power to terminate the purely statutory claims involved by withdrawing their legislative support, the Congress clearly had the power to do so through exercise of its powers over interstate commerce. This would be so even if the claims were not purely statutory, but, as appellants suggest, in some fashion partake of the employment agreement.

Article I, Section 8, of the Constitution gives to the Congress the power:

To regulate Commerce with foreign Nations,
and among the several States, and with the
Indian Tribes.

Under Section 1 of the Portal-to-Portal Act of 1947, the Congress has found that the continued validity of the subject claims would "constitute a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce." And it has declared it to be its policy "to relieve and protect interstate commerce from practices which burden and obstruct it." There can be no question as to the constitutional validity of the end sought to be reached by the Congress. This is the same end that was sought through the enactment of the Fair Labor Standards Act, upon

which the claims now in question depend, the validity of which Act has been established beyond question. *Overnight Motor Co. v. Missel*, 316 U. S. 572, 576-577; *United States v. Darby*, 312 U. S. 100; *Opp Cotton Mills v. Administrator*, 312 U. S. 126.

Of course, it is primarily for the Congress to determine whether and to what extent the existence of such claims interferes with the legislative objective. *Norman v. Baltimore & Ohio R. R. Co.*, 294 U. S. 240, 311-313. There can be no serious question that the findings and policy of the Congress amply support the measures taken by it in Section 2 of the Portal-to-Portal Act.

While Section 10 of Article 1 of the Constitution provides that "No State shall * * * pass any * * * law impairing the obligation of Contracts" and "does not in terms restrict Congress and the United States" (*New York v. United States*, 257 U. S. 591, 601), it is clear that contract rights, like other property rights, are protected by the Fifth Amendment. *Omnia Co. v. United States*, 261 U. S. 502, 508; cf. *Louisville Joint Stock Bank v. Radford*, 295 U. S. 555, 589; *Wright v. Vinton Branch*, 300 U. S. 440, 457. However, it is equally clear that like other property rights, their ownership is conditioned and subject to the possibility of uncompensated destruction through the valid exercise of Congressional powers. *Omnia Co. v. United States*, *supra*, 508-510. All contractual relationships between private parties are entered into not only subject to the existing laws of the United States but, as well, to the changes which the Congress may validly make in such laws. Thus in

Louisville & Nashville R. R. v. Mottley, 219 U. S. 467, where for valuable consideration a contract had been made to issue free transportation to an individual, the railroad company was thereafter relieved of liability thereunder by an act of Congress interdicting the use of "free transportation." In so holding the Court (at p. 42) said:

Long before the above cases were decided, it was said in *Knorr v. Lee*, 12 Wal. 457, 551, that "as in a state of civil society property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government, and no obligation of contract can extend to the defeat of legitimate Government authority."

Again in upholding the validity of congressional action in abrogating gold clauses in private bonds the Supreme Court, through Mr. Chief Justice Hughes, in *Norman v. Baltimore & Ohio R. R. Co.*, *supra* (at p. 307), said:

Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.¹⁰

¹⁰ Attempts to distinguish the *Norman* case, upon the grounds that the creditor could still collect in dollars—hence no property was taken from him—lose sight of the fact that the decision ap-

In *Overnight Motor Co. v. Missel*, 316 U. S. 572, 577, with reference to the constitutional applicability of the overtime provisions of the Fair Labor Standards Act to a contract of release there involved, the Supreme Court, through Mr. Justice Reed, stated:

If overtime pay may have this [beneficial] effect upon commerce, private contracts made before or after the passage of legislation regulating overtime cannot take the overtime transactions "from the reach of dominant constitutional power." *Norman v. B. & O. R. Co.*, 294 U. S. 240, 306-311.

So far as we are aware, the doctrine of the above-mentioned cases has never been characterized by the Supreme Court as an "emergency doctrine," nor has it been applied unfrequently and merely to deal with emergencies, as appellants suggest. On the contrary, it inheres in the Constitution itself and has found fre-

plied as well to "gold value" contracts as to contracts for payment in gold. See the *Norman* case, *supra*, at pp. 298-302; *Guaranty Trust Co. v. Henwood*, 307 U. S. 247, 259-261. The legislation struck down contracts for payment of greater sums of money to be measured by the increased money value of a quantity of gold as well as contracts calling for payment in *speci*. *Holyoke Power Co. v. Paper Co.*, 300 U. S. 324, 334, 337-340. By reason of the enactment of the legislation the beneficiaries of "gold clause" obligations became entitled to fewer dollars than they had had a contract right to receive prior to its enactment. The *Norman* case is clearly in point.

Likewise, arguments to the effect that the doctrine of the *Norman* case was overruled *sub silentio* by the later decision in *Louisville Bank v. Radford*, *supra*, are conclusively refuted by the still later decisions in the other cases cited in this note, *supra*.

quent and varied expression in the decisions of the Supreme Court throughout the years.¹¹

Since the rights which have been found to have been given employees by the Fair Labor Standards Act, did not involve any pledge of "the credit of the United States" (*cf. Perry v. United States*, 294 U. S. 330, 350-351; *Lynch v. United States*, 292 U. S. 571), the employees' position to resist the exercise of the interstate commerce power by the Congress, through the Portal-to-Portal Act, certainly is not improved by the fact that their claims depend for validity upon prior legislation of the Congress rather than upon contracts. As previously indicated, the Congress has plenary power to withdraw benefits conferred by and resting exclusively upon its prior legislation. Moreover, in absence of the exercise of a constitutional power requiring the assumption of a continuing obligation on the part of the United States, an earlier Congress may not validly restrict later Congresses in the exercise of their constitutional powers. See *Lynch v. United States*, *supra*, 579; *North American Com.*

¹¹ In addition to the numerous cases cited in the opinion of the Supreme Court in *Norman v. Baltimore & Ohio R. R. Co.*, *supra*, pp. 307-311, see and compare *Fleming v. Rhodes*, 331 U. S. 100, 107; *Guaranty Trust Co. v. Kenwood*, 307 U. S. 247, 258-259; *American Power Co. v. S. E. C.*, 329 U. S. 99-100, 103-104; *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 435; *DeLaval Steam Turbine Co. v. U. S.*, 284 U. S. 61, 73; *Mitchell v. Clark*, 110 U. S. 633, 643; *Veix v. Sixth Ward Assn.*, 310 U. S. 32, 38-41; *Calhoun v. Massie*, 253 U. S. 170, 175-176; *Wright v. Union Central Ins. Co.*, 304 U. S. 502, 516; *Graham & Foster v. Goodcell*, 282 U. S. 409, 429-430; *North American Co. v. S. E. C.*, 327 U. S. 686, 707-708; *Holyoke Power Co. v. Paper Co.*, 300 U. S. 324, 341; *Bowles v. Willingham*, 321 U. S. 503, 516-619; *Steuart & Bro. v. Bowles*, 322 U. S. 398, 405.

Co. v. United States, 171 U. S. 110, 137; *United Shoe Machinery Co. v. United States*, 258 U. S. 451, 463.

It follows that, even if the rights conferred by the Fair Labor Standards Act could be regarded as "vested" rights in the same sense that contract rights are "vested" rights, the Congress could constitutionally terminate them in the exercise of its power to regulate interstate commerce.

II

The Portal-to-Portal Act does not constitute either an usurpation of judicial power or an unconstitutional interference with its exercise

(a) It has been suggested that the provisions of the Portal-to-Portal Act are violative of the Constitution in that they represent the exercise by Congress of judicial power. In holding a similar contention to be "entirely without merit" the Circuit Court of Appeals for the Fourth Circuit, in *Seese v. Bethlehem Steel Company, supra*, said:

The first contention requires but brief notice. It is true that the effect of the act is to take away rights held by the courts to arise under a statute as they have interpreted it, but this is done, not by the exercise of judicial but of legislative power. When the Fair Labor Standards Act was interpreted by the Supreme Court as requiring computation in the workweek of time consumed in walking to work and other preliminary activities, this was just as though the original act contained express provision to that effect; and, when Congress passed the sections of the statute here under consideration, the

effect was to repeal the original statute to the extent of that coverage and deny to the federal courts jurisdiction to entertain a suit based thereon. This does not in any manner affect adjudications already made, nor does it attempt to direct the courts in the exercise of judicial power. All that it does is to define rights, i. e., to amend or limit the effect of a prior statute so as to take away a cause of action given by it. *Ackerman v. J. I. Case Co.*, 74 F. Supp. 639; *Hollingsworth v. Federal Mining & Smelting Co.*, 74 F. Supp. 1009; note 49 Harvard Law Review, 137, 140. Even where an act is declaratory in form as well as retroactive, it will be upheld ordinarily in those cases where retroactive legislation is permissible. *Graham & Foster v. Goodcell*, 282 U. S. 409, *Stockdale v. Insurance Companies*, 20 Wall. 323.

(b) It is contended, further, that in purporting to relieve the courts of jurisdiction to entertain claims based on activities which were not compensable under contract or custom, the Congress, in effect, attempted to interfere with the exercise of the judicial power of the United States. This contention, also, is without merit.

In Section 1 of the Portal-to-Portal Act, the Congress found that if the Fair Labor Standards Act, so interpreted as to give validity to such claims, or such claims "were permitted to stand, * * * the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged," and it declared it "to be the policy of the Congress in order to meet the existing emergency and to correct existing evils" among other

things "to define and limit the jurisdiction of the courts."

In Subsections (a) through (c) of Section 2 of the Portal-to-Portal Act of 1947, the Congress relieved employers of liability on such claims and prohibited the inclusion of time devoted to such activities in computing the working time of employees for the purpose of application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act. In Subsection (d) it relieved the courts of

jurisdiction of any action or proceeding * * *
to enforce liability or impose punishment for or
an account of the failure of the employer to
pay minimum wages or overtime compensation
under the Fair Labor Standards Act * * *
to the extent that such action or proceeding
seeks to enforce any liability or impose any
punishment with respect to an activity which
was not compensable under Subsections (a) and
(b) of this Section.

Any attack upon the constitutionality of Section 2 of the Portal-to-Portal Act must, of necessity, constitute an attack upon this portion of the legislation because, without jurisdiction of the cause, the Court could not properly pass upon the validity of any portion of the statute.

By Article I, Section 8, of the Constitution, the Congress is given power "to constitute Tribunals inferior to the Supreme Court" and Article III provides that "the judicial power of the United States, shall be vested in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish" and that, except in the cases in which the

Supreme Court is given original jurisdiction, "the Supreme Court shall have appellate jurisdiction both at Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The Constitution clearly contemplates that the judicial branch of the Government shall exercise the judicial power of the United States free of interference from the legislative branch,¹² but, excepting the original jurisdiction conferred upon the Supreme Court by the Constitution itself, the Congress was clearly given the power to define the cases in which the judicial power shall be exercised.

In *Kline v. Burke Construction Co.*, 260 U. S. 226, 234, the Supreme Court, speaking through Mr. Justice Sutherland, said:

* * * Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. *Turner v. Bank of North America*, 4 Dall. 8, 10; *United States v. Hudson & Goodwin*, 7 Cranch 32; *Seldon v. Sill*, 8 How. 441, 448; *Stevenson v. Fain*, 195 U. S. 165. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an Act of Congress to confer it. *The Mayor v. Cooper*, 6 Wall. 247, 252. And the jurisdiction

¹² Cf. *United States v. Klein*, 13 Wall. 128; *Pope v. United States*, 100 C. Cls. 375, 53 F. Supp. 570, 572-574 (reversed in 323 U. S. 1; reversal explained 62 F. Supp. 408, 411).

having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. *The Assessor v. Osborne*, 9 Wall. 567, 575. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an Act of Congress after its exercise has begun, cannot well be described as a constitutional right.

See and compare, also, *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 330; *Railroad Company v. Grant*, 98 U. S. 398, 401, 402 (and cases cited); *Lockerty v. Phillips*, 319 U. S. 182, 187; *Ex parte McCardle*, 7 Wall. 506, 514; *Norris v. Crocker*, 13 How. 429, 439, 440; *In re Hall*, 167 U. S. 38, 42; *Insurance Company v. Ritchie*, 5 Wall. 541, 544; *Smallwood v. Gallardo*, 275 U. S. 56; *Levering & Garrigues Co. v. Morrin*, 71 F. (2d) 284, 287 (CCA 2, 1934), cert. den. 293 U. S. 595.

The attacks which have been made upon the constitutionality of Section 2 (d) of the Act, which have thus far come to our attention, have been based primarily upon decision holding that States may not destroy or so change remedies as to impair the obligations of contracts.¹³ Since Section 10 of Article I

¹³ E. g., *Walker v. Whitehead*, 16 Wall. 314; *Edward v. Kearzey*, 96 U. S. 595, 607; *South Carolina v. Goullard*, 101 U. S. 433; *Tennessee v. Snead*, 96 U. S. 69; *Worthen v. Thomas*, 292 U. S. 426, 431-432. Cf., *Gibbes v. Zimmerman*, 290 U. S. 326, 332; *Bronson v. Kinzie*, 1 How. 311, 320. *Grignon's Lessee v. Astor, et al.*, 2 How. 319, 341-344; *Elliott v. Peirsol*, 1 Pet. 328, 340-341; *Worthen Co. v. Kavanaugh*, 295 U. S. 56; *Richmond Corp. v. Wachovia Bank*, 300 U. S. 124; *Wheeler v. Jackson*, 137 U. S. 245; *Sturges v. Crowninshield*, 4 Wheat. 122, 197-201; *Sohn v. Waterson*, 17 Wall. 596; *Terry v. Anderson*, 95 U. S. 628, 632-633; *Home Bldg.*

of the Constitution, under which such State action is invalidated, is not applicable in terms to the Federal Government and since the Congressional authority over the jurisdiction of the federal courts is given by the Constitution itself in plenary terms, such cases are inapposite where the jurisdiction of federal courts is concerned.¹⁴ Moreover, as we have shown in earlier portions of this Brief, no contract claim is affected by Section 2 (d) of the Act.

No necessity arises in these actions to consider the question of whether the power of the Congress to withdraw cases from the jurisdiction of the District Courts is in fact plenary in the sense that it could be exercised arbitrarily or capriciously. Obviously, these are not such cases. Section 2 (d) of the Act is clearly constitutional.

& *Loan Assn. v. Blaisdell*, 290 U. S. 398; *Fletcher v. Peck*, 6 Cranch 87, 135-137; *New Jersey v. Wilson*, 7 Cranch 164.

¹⁴ While the constitutionality of the provision of Section 2 (d) withdrawing from State courts jurisdiction to entertain portal-to-portal actions cannot properly be in question here, it may be of interest that the report of the House Committee on the Judiciary (No. 71, to Accompany H. R. 2157, 80th Cong., 1st Sess., p. 6) indicates that it relied upon *Bowles v. Willingham*, 321 U. S. 503, as establishing the power of the Congress to withdraw from state courts the adjudication of causes arising out of Federal statutes. See and *cf.*, also *Collector v. Hubbard*, 12 Wall. 1, 15, and cases cited *supra* in support of the Congressional power to terminate rights conferred exclusively by Federal statutes.

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¹³ E. g., *Walker v. Whitehead*, 16 Wall. 314; *Edward v. Kearzey*, 96 U. S. 595, 607; *South Carolina v. Goullard*, 101 U. S. 433; *Tennessee v. Snead*, 96 U. S. 69; *Worthen v. Thomas*, 292 U. S. 426, 431-432. Cf., *Gibbes v. Zimmerman*, 290 U. S. 326, 332; *Bronson v. Kinzie*, 1 How. 311, 320. *Grignon's Lessee v. Astor, et al.*, 2 How. 319, 341-344; *Elliott v. Peirsol*, 1 Pet. 328, 340-341; *Worthen Co. v. Kavanaugh*, 295 U. S. 56; *Richmond Corp. v. Wachovia Bank*, 300 U. S. 124; *Wheeler v. Jackson*, 137 U. S. 245; *Sturges v. Crowninshield*, 4 Wheat. 122, 197-201; *Sohn v. Waterson*, 17 Wall. 596; *Terry v. Anderson*, 95 U. S. 628, 632-633; *Home Bldg.*

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CONCLUSION

For the foregoing reasons the decisions of the Court herein should sustain the constitutionality of the Portal-to-Portal Act of 1947.

Respectfully submitted.

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APPENDIX A

REPORTED DECISIONS OF UNITED STATES DISTRICT COURTS SUSTAINING THE CONSTITUTIONALITY OF THE PORTAL- TO-PORTAL ACT OF 1947 ¹

- Ackerman v. J. I. Case Co.* (Wisconsin), 74 Supp. 639.
- Adkins v. E. I. duPont de Nemours & Co.* (Oklahoma), 13 Labor Cases, par. 64,025, 7 WH Cases 298.
- Alameda v. Paraffine Co., Inc.* (California), 75 F. Supp. 282.
- Bateman v. Ford Motor Company* (Michigan), 76 F. Supp. 178.
- Blessing v. Hawaiian Dredging Co.* (Dis. of Col.), 76 F. Supp. 556.
- Boehle v. Electro Metallurgical Co.* (Oregon), 72 F. Supp. 21.
- Bonner v. Elizabeth Arden* (New York), 13 Labor Cases, Par. 64,147, 7 WH Cases 469.
- Borucki v. Continental Baking Co.* (New York), 74 F. Supp. 815.
- Breusing v. Fisher Body Division* (Missouri), 74 F. Supp. 541.
- Bumpus v. Remington Arms Co.* (Missouri), 74 F. Supp. 788.
- Burfeind v. Eagle-Picher Co. of Texas* (Texas), 71 F. Supp. 743.

¹ In addition to the cases appearing in this list, and not counting the 267 portal-pay suits dismissed within six weeks after the enactment of the Portal-to-Portal Act (1947 WH 1632), we have been advised of more than 70 District Court decisions dismissing such suits as to which we have been unable to locate published reports.

- Cardinale v. General Motors Corp* (New York), 76 F. Supp. 929.
- Cochran v. St. Paul & Tacoma Lumber Co.* (Washington), 73 F. Supp. 288.
- Colvard v. Southern Wood Preserving Co.* (Tennessee), 74 F. Supp. 804.
- DeMaio v. Grant Storage Battery Co.* (Minnesota), 14 Labor Cases, par. 64285, 7 WH Cases 721.
- Devine v. Joshua Hendy Corporation* (California), 77 F. Supp. 893.
- Ditto v. American Aluminum Co.* (California), 73 F. Supp. 955.
- Donovan v. Republic Steel Corp.* (New York), 14 Labor Cases, par. 64,295, 7 WH Cases, 644.
- Elting v. North American Aviation, Inc. of Kansas* (Kansas), 13 Labor Cases, par. 64,154, 7 WH Cases, 491.
- Ferrer v. Waterman Steamship Corporation* (Puerto Rico) 76 F. Supp. 60.
- Glowienke v. Hawaiian Dredging Co.* (Illinois), 14 Labor Cases, par. 64,343, 7 WH Cases, 637.
- Grazeski v. Federal Shipbuilding & Dry Dock Co.,* (New Jersey) 76 F. Supp. 845.
- Hart v. Aluminum Co. of America* (Pennsylvania), 73 F. Supp. 727.
- Hays v. Hercules Powder Co.* (Missouri), 13 Labor Cases, par. 64,123, 7 WH Cases, 381.
- Holland v. General Motors Corp.* (New York), 75 F. Supp. 274. (Affirmed July 8, 1948, as *Battaglia v. General Motors Corp.*, 8 WH Cases 108, 15 Labor Cases, par. 64,169.)
- Hollingsworth v. Federal Mining & Smelting Co.* (Idaho), 74 F. Supp. 1009.
- Hornbeck v. Dain Mfg. Co.* (Iowa), 13 Labor Cases, par. 64,005, 7 WH Cases 296.

- Jackson v. Northwest Airlines, Inc.* (Minnesota), 76 F. Supp. 121.
- Johnson v. Park City Consol. Mines Co.* (Missouri), 73 F. Supp. 852.
- Kirkham v. Pacific Gas & Electric Co.* (California), 13 Labor Cases, par. 64,199, 7 WH Cases 582.
- Lasater v. Hercules Powder Co.* (Tennessee), 73 F. Supp. 264.
- Lassiter v. Atkinson Co.* (Washington), 7 WH Cases 816.
- Local 626, Etc., v. General Motors Corp.* (Connecticut), 76 F. Supp. 593.
- Lockwood v. Hercules Powder Company* (Missouri), 14 Labor Cases, par. 64,366, 7 WH Cases 720.
- Markert v. Swift & Co.* (New York), 13 Labor Cases, par. 64,145, 7 WH Cases 459.
- May v. General Motors Corporation* (Georgia), 73 F. Supp. 878.
- McLaughlin v. Todd & Brown, Inc.* (Indiana), 7 WH Cases 1014.
- Moeller v. Eastern Gas and Fuel Associates* (Massachusetts), 74 F. Supp. 937.
- Plummer v. Minneapolis-Moline Power Implement Co.* (Minnesota), 76 F. Supp. 745.
- Quinn v. California Shipbuilding Corp.* (California), 76 F. Supp. 742.
- Reid v. Day & Zimmerman, Inc.* (Iowa), 73 F. Supp. 892. (Affirmed May 25, 1948, 7 WH Cases 1040, 14 Labor Cases, par. 64,545.)
- Role v. J. Neils Lumber Co.* (Montana), 74 F. Supp. 812.
- Sadler v. W. S. Dickey Clay Mfg. Co.* (Missouri), 73 F. Supp. 690.
- Seese v. Bethlehem Steel Co.* (Maryland), 74 F. Supp. 412. (Affirmed at 168 F. (2d) 58.)

Sinclair v. U. S. Gypsum Co. (New York), 75 F. Supp. 439.

Smith v. American Can Co. (Illinois), 14 Labor Cases, par. 64,281, 7 WH Cases 603.

Smith v. Cudahy Packing Co. (Minnesota), 73 F. Supp. 141.

Sochulak v. American Brake Shoe Co. (New York), 14 Labor Cases, par. 64,220, 7 WH Cases 584.

Sparacino v. Colgate Aircraft Corp. (New York), 13 Labor Cases, par. 64,152, 7 WH Cases 397.

Story v. Todd Houston Shipbuilding Corp. (Texas), 72 F. Supp. 690.

Wan v. E. E. Black, Ltd. (Hawaii), 75 F. Supp. 553.

Wood v. Atkinson (Washington), 14 Labor Cases, par. 64,466, 7 WH Cases 846.

No. 11,889

IN THE
United States
Court of Appeals
For the Ninth Circuit

C. T. POTTER, ET AL.,

Appellants,

VS.

KAISER COMPANY, INC., a corporation,
and UNITED STATES OF AMERICA,

Appellees.

Brief of Appellee, Kaiser Company, Inc.

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Appellees.

Brief of Appellee, Kaiser Company, Inc.

I.

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court for the District of Oregon dismissing an action brought under the Fair Labor Standards Act of 1938, as amended. The dismissal was for want of jurisdiction, by reason of the provisions of Section 2(d) of the Portal-to-Portal Act of 1947.*

The jurisdiction of this Court to hear the appeal exists by virtue of Title 28, United States Code, section 1291 (Public Law 773, 80th Congress, Second Session).

*Herein at times referred to as "the Act."

II.

STATEMENT OF THE CASE**(A) The Pleadings.**

The pleadings in the case, so far as pertinent to the issues raised on this appeal, are fairly stated by Appellants in their Opening Brief, in the first portion of their statement of the case, at pages 2 to 5.

(B) The Evidence.

Appellants' summary of the evidence, as set forth at pages 5 and 6, is sketchy and, quite naturally, overlooks the evidence favorable to the appellee on the basis of which the trial court granted the motion to dismiss under the Portal-to-Portal Act of 1947.

1. THE NATURE OF THE CLAIMS.

The evidence establishes that the appellant guards are seeking to recover overtime and liquidated damages under the Fair Labor Standards Act for time spent in attending roll call, inspection, assignment to posts, issuance of instructions, and marching to their posts. Appellant Potter testified,

“We had to be there a half hour *before we went on duty*”* (Tr., p. 58).

It is to be noted that this witness broke down the claimed half hour by further testifying that the roll call, inspection, post assignment and issuance of instructions took about ten minutes, the remainder of the half hour being consumed by the guards in walking from the guardhouse to their posts of duty in the shipyard (Tr., p. 59).

*Emphasis is ours, unless otherwise noted.

2. THE WINDFALL CHARACTER OF THE CLAIMS.

While the amended complaint of the Appellants makes claim for the described activities in the period between February 1, 1942, and May 1, 1946 (Tr., p. 5), at the trial Appellants' counsel conceded that no claims existed after March 3, 1945 (Tr., pp. 86-87). Thus, this appeal involves claims for overtime covering a period in excess of three years, from February 1, 1942, to March 3, 1945.

It is admitted that Appellants were paid their wages week by week; that they accepted and cashed their checks; that since they were being paid at hourly rates they knew how many hours they were being paid for; and that they knew that Appellee, in computing their time, was not including any time in advance of their arrival at their posts of duty in the shipyard (Tr., pp. 76-78).

Notwithstanding this knowledge on the part of Appellants, they concede that the first demand made by them on Appellee was not made until this action was instituted on January 17, 1946 (see Tr., p. 50), more than ten months after the expiration of the period covered by the claims and almost four years after the commencement of the claim period (Tr., pp. 78-79). (This statement is subject to the qualification that the claims were the subject of a discussion between counsel for the parties three or four months before the action was commenced, see Tr., p. 79.)

Appellant Potter, who is the assignee of all the other Appellants (Tr., p. 79), started taking assignments of the claims some time after his employment terminated on March 4, 1945 (Tr., p. 80). Commencing in December, 1944, he had heard rumblings in the guard department that payment should be made for reporting time (Tr., p.

80), but he did not bother to pursue the matter until around June or July, 1945, when he consulted with the Wage and Hour Division of the Department of Labor and was told that, on the basis of certain court decisions, the guards had claims against Appellee (Tr., pp. 84-85). It was then that Potter and his friends decided they should get together and file a lawsuit, whereupon he commenced taking the assignments (Tr., pp. 85-86).

All of this evidence is highly pertinent on the issue as to whether the amounts sought to be recovered by this appeal are "windfall payments, including liquidated damages, of sums for activities performed by them (Appellants) without any expectation of reward beyond that included in their agreed rates of pay" as referred to in Section 1(a)(4) of the Portal-to-Portal Act.

3. THE NON-EXISTENCE OF A CONTRACT, CUSTOM OR PRACTICE MAKING THE ACTIVITIES COMPENSABLE.

With respect to the requirements of Section 2 of the Portal-to-Portal Act concerning the existence of an express provision of a contract between Appellants and Appellee, or a custom or practice, making compensable the activities covered by the claims, the record establishes beyond the remotest doubt that there was no such contractual provision, no such custom and no such practice.

The testimony of Appellant Potter (which by stipulation was adopted as the testimony of the other Appellants on the issue as to the application of the Portal-to-Portal Act; see Tr., pp. 89-90) leaves no doubt on these subjects. He testified that he had no written contract; that Appellee never told him he would be paid for time spent in reporting prior to going on his shift; that in the period involved

Appellee never to his knowledge paid any guard for time in advance of going to his post of duty; that so far as he knew, Appellee never had in effect at the shipyard where Appellants were employed any custom or practice under which reporting time was paid for; and that he had no written or non-written contract under the terms of which such time was to be considered in computing wages (Tr., pp. 82-83). Furthermore, there is no collective bargaining agreement involved (Tr., p. 87).

The testimony on these points is ably summarized in the following concession by counsel for Appellants:

“Mr. Landye: No. *We will say that there was no written contract or oral contract that I can prove, at least, that this half hour was to be compensated for.*

Mr. Johnson: *I take it, too, from your statement, since you say none of them were paid at any time, that there was no custom or practice at the Swan Island Yard under which the time was compensable?*

Mr. Landye: *Unless I can take custom and practice retroactively.* After March 3, 1945, they discontinued the practice” (Tr., pp. 87-88).

(C) The Findings and Conclusions.

Appellants dispose of the Findings of Fact and Conclusions of Law by quoting a portion of one finding from which they apparently derive satisfaction, and very casually mentioning the remainder.

They fail to note that in Finding 4 the court found that there was no contract under which the activities sued on were compensable, the only contract being that Appellants would be compensated for the time spent by them in actually guarding the shipyard (as distinguished from

the activities sued on) and that said contract had been fully performed and Appellants fully paid thereunder; and that in Finding 5 the trial court found that there was no practice, custom or usage at the shipyard involved under which guards were compensated for time spent before or after the performance of their principal activity of guarding the shipyard, the fact being that in computing time worked by guards, allowance was made only for time spent at posts of duty while guarding the shipyard, as distinguished from time spent in reporting, preparation for duty, roll call, assignment to post, receipt of instructions and going to or from posts of duty (Tr., pp. 39-41). Conclusions 2 and 3 are of like effect (Tr., pp. 41-42).

It was by reason of the evidence outlined above, summarized in the foregoing findings and conclusions, that the trial court determined that the activities sued on were not compensable under Section 2(a) or Section 2(b) of the Portal-to-Portal Act and that, consequently, under the provisions of Section 2(d) of the Act jurisdiction was lacking (Tr., p. 42). The judgment of dismissal was therefore entered "for want of jurisdiction" (Tr., pp. 43-44).

(D) The Questions Involved on the Appeal.

As Appellants correctly state, the two issues raised by the appeal are: (1) whether Section 2 of the Portal-to-Portal Act is applicable to the present case; and, if so, (2) whether as so applied the Act is constitutional.

III.

ARGUMENT

A. Section 2 of the Portal-to-Portal Act of 1947 Is Applicable to the Facts of This Case.**1. SECTION 2 OF THE ACT MAKES ALL CLAIMS UNDER THE FAIR LABOR STANDARDS ACT IN EXISTENCE ON THE ENACTMENT OF THE ACT UNENFORCEABLE UNLESS SUCH CLAIMS ARE MADE COMPENSABLE BY AN EXPRESS PROVISION OF A CONTRACT OR BY A CUSTOM OR PRACTICE.**

By its plain and unequivocal language, Section 2 of the Portal-to-Portal Act prohibits the enforcement of any overtime claims under the Fair Labor Standards Act which came into existence prior to May 14, 1947 (the date of enactment of the Portal-to-Portal Act), unless such claims involve activities which were compensable by either (1) "an express provision of a written or nonwritten contract" or (2) "a custom or practice." Thus, Section 2 provides:

"RELIEF FROM CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.

(a) *No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—*

(1) *an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or*

(2) *a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or non-written contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.*

(b) *For the purposes of subsection (a) an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.*

(c) *In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.*

(d) *No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."*

Notwithstanding the simple and plain provision of the Act that an employer shall not be liable for an existing overtime claim *unless the activity giving rise to the claim was compensable by contract, custom or practice*, Appellants undertake (at pages 15 to 22 of their Opening Brief) the task of rewriting Section 2 so as to limit and qualify its provisions and their application. They first argue that “the sole reason for passage of the Portal-to-Portal Act” (Appellants’ Opening Brief, p. 15) was the Supreme Court’s decision in the *Mt. Clemens* case, 328 U.S. 260; and they then assert, on the basis of references to the Congressional Record, that such was the intent of Congress. Thus, they conclude that while the Act is applicable to a case where an employee “is suffered or permitted to work when not *required** to do so” (Appellants’ Opening Brief, p. 21), “it is crystal clear that Congress did not intend to apply the Act to situations such as those involved in this case” (Appellants’ Opening Brief, p. 21) in which the employees were required to perform the activities sued on.

In making this argument, Appellants either overlook or fail to understand the legislative history of the Portal-to-Portal Act. As originally enacted by the House, the Act (H.R. 2157) dealt with both existing claims and future claims in one section. When H.R. 2157 reached the Senate, it was amended so as to treat existing claims in one section and future claims in another section. The Conference Committee of the Senate and the House then prepared a substitute bill which incorporated the Senate’s division of existing and future claims into two separate

*Appellants’ emphasis.

sections (see Bureau of National Affairs: The Portal-to-Portal Act of 1947, pp. 3-5).

When Section 2, dealing with existing claims, and Section 4, dealing with future claims, are compared, it will be noted that there is a radical difference between the two sections. Section 4, with respect to future claims, contains a prohibition against the enforcement of limited types of claims, that is, (1) walking, riding or traveling to and from the actual place of performance of the principal activity and (2) activities preliminary or postliminary to the principal activity. These activities are those commonly known as portal-to-portal activities and of the character involved in the *Mt. Clemens* case.

On the other hand, Section 2 contains no such limitation on the activities to which it is applicable. It says that an employer shall not be liable "for or on account of *any* activity * * * except an activity which was compensable by either * * *" an express provision of a contract, or a custom or practice.

Consequently, if we were concerned in this case with Section 4, the argument of Appellants might be applicable; but we are here concerned with Section 2, and Appellants' argument is therefore unsound because it fails to recognize the historical legislative fact that the Act as finally enacted applies entirely different rules to existing claims than to future claims. With respect to future claims, the prohibition against enforcement applies to limited types of activity; with respect to existing claims, the prohibition against enforcement applies to *any* activity unless it is compensable by an express contract provision or by a custom or practice.

The very quotation from the Senate debate which Appellants quote at pages 19 and 20 of their Opening Brief demonstrates that the confusion into which they have been drawn by reason of their failure to distinguish between Section 2 and Section 4 existed also on the floor of the Senate. In the quotation, Senator Pepper commented on a situation in which women were told to come to their place of employment half an hour early for the purpose of getting ready to work. Senator Baldwin replied that there was no question but that such time would be compensated for. However, Appellants have inadvertently failed to complete the quotation, for immediately following that portion set forth in their brief, the following discussion occurred:

“Mr. Pepper. Let us see whether the Senator from Connecticut or the Senator from Florida has a point. *I am assuming that the Senator from Connecticut knows that under the terms of the committee bill the cases referred to on page 48 are compensable only in the future, and not in the past.* Does the Senator recognize that?

Mr. Baldwin. *I did not so understand.*

Mr. Pepper. That is where the able Senator was in error. *If the committee had laid down the same principle as to existing claims, it would have been a far-reaching step.*”

This additional portion of the debate not only negatives Appellants' argument as to what the understanding of the Senate was, but demonstrates the confusion that results if one fails to distinguish between the broad prohibition on the enforcement of existing claims contained in

Section 2 and the narrower limitation on future claims contained in Section 4.

That the application of the Act is not limited to the factual situations involved in the *Mt. Clemens* case is emphasized by the case of *Kemp v. Day & Zimmerman Incorporated* (June 15, 1948), 15 Labor Cases, ¶64,588, in which the Iowa Supreme Court said (15 Labor Cases, page 73,842):

“The short title or designation of ‘Portal-to-Portal Act’ is not significant, but it is significant that many of the decisions refer to it as the ‘so-called’ Portal-to-Portal Act. The *Mt. Clemens* case was perhaps the final and impelling force in bringing about the passage of the Act, but the holdings in *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296 [9 Labor Cases ¶51,197], and *D. A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 66 S.Ct. 925, 90 L.Ed. 1114, 167 A.L.R. 208 [11 Labor Cases ¶51,230], preventing amicable settlements between employer and employee, avoiding a release in full, and an accord and satisfaction of a good faith dispute, and the decision in *Overnight Transportation Co. v. Missel*, 126 F.(2d) 98 [5 Labor Cases ¶60,854] (4 Cir. 1942), affirmed in 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682 [5 Labor Cases ¶51,145], that the liquidated damages provision was mandatory regardless of the good faith of the employer or the reasonableness of his attitude, had their part in the inclusion of remedial provisions in the Portal-to-Portal Act.

The reach of the Act extends beyond activities of the *Mt. Clemens* case type. As said in *Seese v. Bethlehem Steel Co.*, 74 F.Supp. 412, 416 [13 Labor Cases ¶64,061], *supra*: ‘It will be noted that the Act in this respect is not limited to portal-to-portal activities, as such, but defines the essential character-

istics of any alleged liability for nonpayment of minimum wages or overtime compensation. *None* are to be compensable “except an activity which was compensable by either—” contract, custom or practice. Furthermore, while the language includes the word “except,” it seems entirely clear from the whole wording that the *exception is the only activity which is compensable.*’ ”

And in *Bateman v. Ford Motor Co.*, *supra*, 14 Labor Cases ¶64,353 (D. C. E. D. Mich. S. Div. 2/27/48), after quoting Sections 2 (a) (1) (2), [it was] said:

‘These provisions applied to any employer liabilities, whether based on activities prior to or after the Act’s enactment, making the act admittedly retroactive, *and furthermore, applying with equal force to claims which under previous decisions might have been considered meritorious as well as to fantastic “windfalls” sought by the great majority of these so-called Portal-to-Portal suits.*’ (Italics supplied.)’

Similarly, in *Boerkoel v. Hayes Mfg. Corp.* (W.D. Mich., S.D. March 26, 1948) 14 Labor Cases, Para. 64,415, p. 73,126, it was held:

“Plaintiff contends that Section 2 of the Portal-to-Portal Act is not applicable because his suit is not based on strictly portal-to-portal activities, that is, activities preliminary or postliminary to his principal activities. *However, this contention ignores the plain wording of that section, which covers all activities and claims arising prior to the passage of the Act and determines the compensability of all activities during an employee’s day.* It should be noted that Section 4 of the Act deals only with future claims

for so-called portal-to-portal activities. In determining that Section 2 of the Act is not limited to strictly portal-to-portal activities, the court said in *Seese v. Bethlehem Steel Co.*, *supra* (74 F. Supp. 416 [13 Labor Cases ¶64,061]):

‘When we look at the wording and structure of the Portal Act we find that it was clearly intended to define what activities claimed to create a liability for overtime work were made compensable. Thus the language reads—(see Section 2 (a) hereinbefore quoted). * * * It will be noted that the Act in this respect is not limited to portal-to-portal activities as such but defines the essential characteristics of any alleged liability for nonpayment of minimum wages or overtime compensation. None are to be compensable “except an activity which was compensable by either—” contract, custom or practice. Furthermore, while the language includes the word “except,” it seems entirely clear from the whole wording that the exception is the only activity which is compensable.’ ”

Thus, the legislative history with respect to the Act disproves the argument of Appellants that Congress intended to limit the application of the Act, so far as existing claims were concerned, to situations such as were presented in the *Mt. Clemens* case. The action of Congress in distinguishing between existing and future claims and dealing with the two subjects in separate and materially different sections conclusively demonstrates (if anything other than the plain language of the sections were required to do so) that *Congress intended to bar all existing claims except those involving an activity which was*

compensable either by express provision of a contract or by custom or practice. The artificial line of demarcation which Appellants seek to draw within the field of existing claims is not supported by the language of the Act or by its history.

Neither is this artificial line of Appellants supported by the decisions since the enactment of the Portal-to-Portal Act. There have been two decisions involving the enforceability of claims for activities almost identical with those sued on here, and in both cases the provisions of Section 2 were held to bar the enforcement of the claims.

The first of these cases is *Battery Workers' Union v. Electrical Storage Battery Co.* (E.D. Pa., January 30, 1948) 14 Labor Cases, Para. 64,298, where company guards arrived twenty to thirty minutes before the start of their shift. During the period prior to the time their shift started they changed into uniforms, picked up equipment, reported to the captain's office to receive instructions and went to their posts. The court stated at page 72,712:

“The mere fact that a guard was at the defendant's plant or on the premises, after punching in, for more than 40 hours in any week (or in terms of a 5 day week, more than 8 hours per day) does not entitle him to overtime pay. Under the Fair Labor Standards Act, overtime for which claim is made must be devoted to work. *Moreover, since the Portal-to-Portal Act of 1947, regardless of the fact that the activities may constitute work under the Fair Labor Standards Act, the employer is required to pay overtime for only such of them as were compensable by either express contract or by custom or practice.*

In the present case the plaintiff's claim for overtime as to each guard is made up by aggregating three different kinds of activities: (1) 'On guard' duties—standing at a fixed post or making rounds through the plant—(2) changing into and out of uniform, (3) reporting to the captain's office to pick up equipment and receive instructions, walking to and from the post, turning in equipment and waiting in the locker room to punch out at the end of the shift.

As to (1), there can be no question that the time spent on posts and on rounds is work within the Fair Labor Standards Act and is chargeable to the employer under the Portal-to-Portal Act.

As to (2), one of the issues submitted to the jury for its special verdict was, 'Were the guards engaged in work when they were changing into and out of uniform?' The jury answered 'No.' * * * But even if, in spite of the special verdict, changing into and out of uniform should be held to be work under the Fair Labor Standards Act, the employer would be relieved of liability to pay for it by the Portal-to-Portal Act. There is no evidence that it was an activity which was ever compensable either by contract or by custom. The plaintiff contends that the union contract makes it compensable, but the provisions relied upon are merely general overtime provisions and in no way attempt to define the nature of the work for which overtime will be paid. The Act does not merely require that the contract provide for payment of overtime pay but that it must expressly provide that the activities in question be compensable.

I hold that the retroactive provisions of the Portal-to-Portal Act apply to the facts of the present case and that the Act as so applied is constitutional.

As to (3), assuming that these activities constitute work under the decision of the Supreme Court in the *Mt. Clemens* case, they also are noncompensable by the Portal-to-Portal Act.”

The other case is *McLaughlin v. Todd & Brown, Inc.* (N.D. Ind., S.B. Div., April 7, 1948) 15 Labor Cases, Para. 64,606. In that case company firemen were required to assemble at the plant before starting their shift. This assembly period was fixed at thirty minutes prior to the time the shift started and during this period of time the firemen changed into their fire-fighting uniforms, put their fire-fighting equipment, such as helmets and boots, on the fire trucks, stood roll call and went to their posts of duty.

The plaintiffs contended the roll call time *was required* and was therefore part of their “principal activity.” The court held that the claim for the time spent during these roll call periods was not compensable since such claims were barred by Section 2 of the Act, stating at page 73,894:

“The plaintiffs contend that they were required to appear on the employer’s premises and start their ‘essential’ duties before the beginning of the period for which they were paid. Rather than being a preliminary activity, they say that their ‘show up’ time was actually a part of their principal activity and that, therefore, Section 2 of the Portal-to-Portal Act does not apply. In support of this view, the plaintiffs maintain that this section must be interpreted in light of Section 1 of the Act, which contains a statement of policy and findings revealing the purpose of Congress at the time of its enactment; further, the

plaintiffs contend that it was the purpose of Congress to nullify the effect of judicial interpretation of the Fair Labor Standards Act of 1938 'in disregard of long established customs, practices and contracts between employers and employees,' which specifically, plaintiffs say, meant preliminary and postliminary activities that theretofore never had been regarded as compensatory and which became so only after the decisions in *Tennessee Coal, I., & R. R. Co. v. Muscoda Local*, 321 U.S. 590 [8 Labor Cases ¶51,175]; *Jewell Ridge Coal Corp. v. Local* 6167, 325 U.S. 161 [9 Labor Cases ¶51,201], and *Anderson et al. v. Mt. Clemens Pottery Co.*, 328 U.S. 680 [11 Labor Cases ¶51,233].

Section 2 of the Act provides that unless an activity was compensable by either a written or oral contract or by a custom or practice in effect at the time the activity was performed, the employer is not liable to compensate for such activity under the Fair Labor Standards Act of 1938, as amended. *There is nothing ambiguous about the provision. Its meaning is explicit and plain.* And where a statute is plain and unambiguous, there is no room for construction. *U. S. v. Wiltberger*, 18 U.S. 76 (1820); *Cutten v. Wallace*, 80 F.(2d) 140 (1935).

There is no evidence that the activities covered by the 'showup' time in question were made compensable either by an express provision of a written or oral contract or by a custom or practice covering such activity. This being the fact, it must be concluded that the Portal-to-Portal Act bars recovery, unless, as the plaintiffs contend, Section 2 of the Act is unconstitutional.

However, if one adopts the plaintiffs' contention that Section 2 of the Act must be interpreted in the

context of the statute as a whole, and with particular reference to the statement of policy contained in Section 1, there is nothing which would change the foregoing conclusion.”

It is submitted that the language of Section 2, the legislative history of the Act, and the interpretation placed on it by the courts compel the rejection of Appellants’ effort to limit the application of Section 2 and require affirmance of the action of the trial court in dismissing this case for want of jurisdiction, by reason of the provisions of the Act.

2. THE TRIAL COURT’S FINDINGS AND CONCLUSIONS CANNOT BE DISTORTED SO AS TO MAKE NON-COMPENSABLE ACTIVITIES COMPENSABLE.

Appellants next argue that the Act is not applicable to the present case for the reason that if the activities sued on were not preliminary or postliminary they were compensable under the contract of employment, which, so they say, “admittedly provided compensation for all activities not of a ‘preliminary’ or ‘postliminary’ nature * * *” (Appellants’ Opening Brief, p. 23). They further state that the court found, in effect, “that the company promised to pay for all of the principal activities of the guards.” (Appellants’ Opening Brief, p. 25).

In making these arguments, Appellants seek to twist and distort the distinction which the trial court made between the principal activity of guarding the shipyard and the activities sued on, which the trial court termed preliminary or postliminary to said principal activity. Thus, in Finding 3 the Court found that the claimed

hours of overtime related “to activities which were preliminary to or postliminary to the principal activity of plaintiffs as aforesaid, namely, guarding said shipyard.” (Tr. pp. 39-40). In Finding 4 the trial court found that there was no contract, written or unwritten, making compensable activities preliminary or postliminary to Appellants’ “principal activity, to-wit, guarding said shipyard” but that the only contract with Appellants was that they would be compensated for the time spent by them in actually guarding said shipyard, as distinguished from any preliminary or postliminary activities in connection therewith (Tr., p. 40). Finding 5, dealing with the custom or practice at the shipyard, is similar, reciting that the practice, custom and usage at the shipyard in computing time worked by guards was to allow only the time actually spent by the guards “at their posts of duty and while guarding said shipyard.” (Tr., pp. 40-41).

It is abundantly clear that by its findings and conclusions the trial court drew a line of distinction between the time spent by Appellants at their posts of duty while actually guarding the shipyard, as distinguished from the time spent by them in reporting, preparing for duty, attending roll call, receiving assignments and instructions, and going to or from their posts of duty. The trial court held that the contract with the Appellants, and Appellee’s custom and practice, was to pay only for the time spent by the guards at their posts of duty and while actually guarding the shipyard, as distinguished from the activities sued on and described in the preceding sentence hereof. Nowhere in the findings or the conclusions (or elsewhere

in the record, for that matter) is there any admission that the contract “provided compensation for all activities not of a ‘preliminary’ or ‘postliminary’ nature.” Nor do the findings of the court have the effect of holding that Appellee promised to pay for any activities, however they may be called, other than actual guarding of the shipyard by the guards while at their posts of duty. To contend otherwise is to attempt to import into the record something which is not there.

Appellants argue, of course, that the court misapplied the words “preliminary” and “postliminary” for the reason that in fact the activities sued on were “principal” activities. They again attempt to build up an argument out of the provisions of Section 4 of the Act which, as already noted, have nothing to do with this case. The ultimate fact is that the trial court applied the proper section of the Act to the case and considered whether, within the meaning of Section 2, the activities sued on were compensable by express contract provision or by custom or practice. It found in the negative with respect to contract, custom and practice. It found that by contract, custom and practice only the time spent by the guards at their posts of duty in actually guarding the shipyard was compensable and that the activities sued on, irrespective of whether they be characterized as preliminary, postliminary, or otherwise, were not compensable.

The court could have reached no other conclusion in the light of the testimony that there was no contract, custom or practice making the involved activities compensable (Tr., pp. 82-83), and the concession of Appellants’ counsel

that there was no contract (written or unwritten) and no custom or practice under which the activities sued on were compensable (Tr., pp. 87-88). In the face of this testimony and this concession, the effort of Appellants to distort the trial court's findings and conclusions by an argument that the activities sued on were compensable under the contract is beyond understanding.

Appellants attempt to support their argument by a strange mixture of ingredients. They first refer to Section 4 of the Act, dealing with *future* rather than *existing* claims, and to Congressional reports and debates with respect to future claims. They then refer to administrative interpretations of the Wage and Hour Division dealing with Section 4, and to court decisions on the compensability of guards' reporting time, which decisions were rendered before the enactment of the Act.

However, when all is said and done, their argument at this point fails because, in final analysis, they are attempting to say that the activities sued on were compensable under the contract, but the evidence discloses no such contract as they contend for, their counsel conceded "that there was no written contract or oral contract that I can prove, at least, that this half hour was to be compensated for" (Tr., p. 87), and the trial court in its findings and conclusions determined that there was no such contract.

3. THE EMPLOYMENT OF APPELLANTS AT HOURLY RATES DID NOT MAKE THE ACTIVITIES SUED ON COMPENSABLE.

The third argument advanced by Appellants in support of their general proposition that the Portal-to-Portal Act is inapplicable to the present case is that since the employ-

ment was on the basis of hourly rates, with time and one half for overtime, the employment contract requires compensation for the activities sued on (Appellants' Opening Brief, pp. 32-36).

In support of this argument, Appellants refer to two decisions issued since the enactment of the Portal-to-Portal Act, one by Judge Yankwich of the Southern California District, and one by Judge Igoe of the Northern Illinois District:

Devine v. Joshua Hendy Corporation (S.D. Cal., April 30, 1948) 77 Fed. Supp. 893;

Frank v. Wilson & Co., Inc. (N.D. Ill., Jan. 30, 1948) 14 Labor Cases, Para 64,296.

It is to be borne in mind, however, that in both of those cases written collective bargaining contracts were involved, and the courts were therefore concerned in those cases with the application of the provisions of such contracts. In the present case, on the other hand, apart from the concession of Appellants' counsel that "there was no written contract or oral contract that I can prove, at least, that this half hour was to be compensated for" (Tr., p. 87) there is no evidence of any such contract as was involved in the cited cases.

Here the question is as to how the time worked was computed, and the evidence establishes, as the trial court found in Findings 4 and 5, that the computation was made by allowing for and counting only the time actually spent by the guards at their posts of duty while guarding the shipyard. This being the contract, the custom and the

practice, Appellants cannot enlarge thereon by referring to the cited cases involving other factual situations.

**4. ASSUMING AN IMPLIED CONTRACT TO PAY FOR THE ACTIVITIES
SUED ON, THE PORTAL-TO-PORTAL ACT IS NEVERTHELESS APPLICABLE.**

The final argument advanced by Appellants in support of the inapplicability of the Portal-to-Portal Act is that there was an implied contract to pay for the activities sued on.

While this argument, again, is apparently contrary to the position taken by Appellants' counsel at the trial that he could prove no contract under which the time sued on was to be compensated for, the complete answer to the argument (if the record supported the claimed implied contract, which it does not) is contained in the provisions of Section 2 of the Act, that an existing overtime claim for any activity is not enforceable unless it was compensable by either "an *express* provision of a written or non-written contract" or a "custom or practice."

We submit that when Congress used the word "express" it meant what it said and intended that a contractual provision sufficient to make an activity compensable had to be directly or expressly stated, as distinguished from being implied. After all, one of the basic distinctions in contract law is that between an express provision and an implied provision; and Congress must be credited with at least a school boy's knowledge of English and of law.

This argument of the Appellants not only runs directly contrary to the unambiguous language of Section 2, but also contrary to the decisions interpreting the section.

See

Kemp v. Day & Zimmerman Incorporated, supra;
Battery Workers Union v. Electrical Storage Battery Co., supra; and
McLaughlin v. Todd & Brown, Inc., supra.

5. CONCLUSION WITH RESPECT TO THE APPLICATION OF SECTION 2 OF THE ACT TO THE PRESENT CASE.

The claims for overtime involved in this case arose in the period from February 1, 1942, to March 3, 1945. This action was commenced on January 17, 1946. Thus, the claims were in existence and this action was pending when the Portal-to-Portal Act was enacted on May 14, 1947. Consequently, Section 2 of the Act relating to *existing* claims for overtime under the Fair Labor Standards Act is applicable to the present case.

Furthermore, the record abundantly establishes that the claims here involved constitute "windfall" claims. Appellants were paid from week to week and knew, throughout the entire period of more than 3 years covered by the claims, that they were not being compensated for the activities and the time sued on. The testimony of the representative appellant, Potter, establishes that it was not until December, 1944, that the Appellants first conceived the idea that they had claims against the Appellee on which they now sue and that up to that date, covering the bulk of the period involved, they had no "expectation of reward beyond that included in their agreed rates of pay." Therefore, the claims fall within the Congressional findings stated in Section 1 of the Act.

Since the claims existed on the enactment of the Act

and are for overtime compensation under the Fair Labor Standards Act, Section 2(a) prohibits their enforcement unless they relate to an activity which was compensable by either "an express provision of a written or non-written contract" or "a custom or a practice." The testimony establishes, and counsel for Appellants conceded, that there was no such contract and no such custom or practice.

In addition, the provisions of Section 2(b) and Section 2(c) of the Act must be considered. Section 2(b) provides that an activity shall be considered compensable under a contract custom or practice "only when it was engaged in *during the portion of the day with respect to which it was so made compensable.*" The record in this case shows that Appellee never paid any guard employed by it for the time in advance of his going to his post of duty and actually guarding the shipyard; and there is no evidence that it ever agreed to do so.

Section 2(c) provides that in determining the time for which an employer employed an employee "there shall be counted all that time, *but only that time*, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section." The only compensable time established by the record is the time during which the guards actually guarded the shipyard at their posts of duty, and, accordingly, that is the only time that can be counted under Section 2(c).

It is submitted that by their evidence and their concessions, Appellants themselves have affirmatively shown that their claims are unenforceable under Section 2 of the

Act and that, therefore, under subsection (d) the court was without jurisdiction. Despite all of their arguments to the contrary, in final analysis Appellants' claims are contrary to the direct, plain and unambiguous language of Section 2, and that Section constitutes an insurmountable obstacle to the enforcement of the claims sued on in this action.

B. Section 2 of the Portal-to-Portal Act Is Constitutional as Applied to the Facts of This Case.

Appellants assert that Section 2 of the Act, as applied to the present case, is unconstitutional for various reasons.

The United States, as an intervenor, has filed a comprehensive brief on the constitutional issues. We shall not burden the Court with a repetition of the arguments presented by the Government in support of the constitutionality of the Act. We desire only to point out that the Act has uniformly been held to be constitutional, as is indicated by the decision of the Court of Appeals for the Second Circuit in *Battaglia, et al. v. General Motors Corporation* (July 8, 1948), 15 Labor Cases, Para. 64,619, and the decision of the Court of Appeals for the Sixth Circuit in *Fish v. General Motors Corporation* (August 2, 1948), 15 Labor Cases, Para. 64,674.

On the basis of these two decisions, together with the arguments presented and the decisions cited in the Government's brief, it is submitted that the Portal-to-Portal Act, as applied to the present case, is constitutional.

CONCLUSION

On the basis of the foregoing considerations, it is respectfully submitted that the trial court's judgment of dismissal for want of jurisdiction should be affirmed.

The claims involved in this case existed on the enactment of the Portal-to-Portal Act of 1947 and are therefore subject to Section 2 of the Act. In these circumstances, the claims are unenforceable in the absence of a showing that the activities sued on were compensable either by an express contract provision or by a custom or practice. The evidence not only fails to disclose such an express contractual provision or custom or practice but it was conceded by Appellant's counsel that such contract, custom and practice did not exist and could not be proved. Such being the record, the trial court was clearly without jurisdiction, by reason of the provisions of Section 2(d) of the Act, and had no alternative but to order dismissal.

The attack on the constitutionality of the Act is not well-founded and therefore the order of dismissal should stand affirmed.

Respectfully submitted,

GORDON JOHNSON,

RICHARD DEVERS,

J. WARREN MANUEL,

*Attorneys for Appellee,
Kaiser Company, Inc.*

THELEN, MARRIN, JOHNSON & BRIDGES,

HART, SPENCER, McCULLOCH & ROCKWOOD,

Of Counsel.

No. 11889

**In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

C. T. POTTER, et al.,

Appellants,

v.

KAISER COMPANY, INC., a
corporation, and UNITED
STATES OF AMERICA,

Appellees.

Upon Appeal from the United States District
Court for the District of Oregon.

APPELLANTS' REPLY BRIEF

GREEN, LANDYE & PETERSON,
JAMES T. LANDYE,
Attorneys for Appellants.

GORDON JOHNSON,
RICHARD DEVERS,
THELEN, MARIN, JOHNSON & BRIDGES,
HART, SPENCER, MCCULLOCH & ROCKWOOD,
Attorneys for Kaiser Company, Inc.

TOM C. CLARK, Attorney General
PEYTON FORD, Assistant Attorney General
HENRY L. HESS, United States Attorney
Attorneys for United States of America.

FILED

OCT 5 - 1948

PAUL P. O'BRIEN,
CLERK

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**In the United States
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Appellants,

v.

KAISER COMPANY, INC., a
corporation, and UNITED
STATES OF AMERICA,

Appellees.

Upon Appeal from the United States District
Court for the District of Oregon.

APPELLANTS' REPLY BRIEF

In reply to respondent's brief, appellants will limit argument to the principal points made by respondent.

1. *Respondent's Argument that Appellants Failed to Distinguish between Existing and Future Claims in Contending that Act Not Intended to Apply Where Employees REQUIRED to Report at Specified Time in Advance of Regular Shifts.*

Respondent first charges that appellants have failed to distinguish between the application of the Portal-to-Portal Act to then existing claims and to future claims. (Resp. Br. p. 10) Appellants' brief, at pages 24 to 26,

discusses and recognizes this distinction and goes on to demonstrate why, in spite of this distinction, it cannot be said that Congress intended that the Portal-to-Portal Act should apply to either existing or future claims where employees were *required* to report at a specified time in advance of their regular shifts.

It may be that the colloquy in the Senate between Senator Pepper and Senator Baldwin may not be conclusive on this point for the reasons stated by respondent. But that does not answer the other arguments in appellants' brief in support of this contention. For example, no attempt is made by respondent to qualify or explain away the statement made in the House of Representatives by Representative Walter in presenting the Act on the floor of the House and in discussing the meaning of the term "custom and practice" in Section 3 of the Act (Section 2 of the final Act, dealing with existing claims). As quoted in Appellant's Brief, p. 19, Representative Walter stated that no employer could *require* an employee to get to work an hour before punching the clock and then excuse himself on the ground of custom and practice. Yet that, in effect, is what respondent would do in this case and that is what Representative Walter says that Congress did not intend, even as to then existing claims.

2. *Respondent's Argument that Portal-to-Portal Act not Limited to Portal-to-Portal Cases.*

Respondent next argues that the Portal-to-Portal Act is not limited to Portal-to-Portal cases. (Resp. Br. p. 12). Thus respondent cites three cases in which it has been held that this Act is not limited to such cases, despite the title of the Act. (Id., pp. 12-14). It is true that some courts have so held, but respondent has not cited any Circuit Court of Appeals decision to that effect. On the contrary, as cited in Appellant's Brief (p. 20), it has been held in *Western Union v. McComb* (CC..A. 6th), 165 F. (2d) 65, that the "underlying reason" for the Act was to foreclose myriads of suits for compensation for "'walking time and the like" brought under the decision in the *Mt. Clemens* case. Nor does respondent attempt to explain other authority to the same effect in appellants' brief (pp. 17-21). It is, of course, self-evident that there was at all times a clear distinction between such "portal-to-portal" cases, in which employees were not *required* to be on the premises at any specified time and place and cases in which employees had been so required to report and as to which there had been no question of liability for payment, at least since 1940, when the U. S. Department of Labor made a public statement of that position. (See App. Br. p. 21).

Two lower court decisions are cited by respondent in an attempt to answer this argument and to establish re-

spondent's contention that the Act applies to bar existing claims even when employees were *required* to report for work at a specified time and place in advance of their regular shift. (Resp. Br. pp. 15-19). In reading the first of these cases, *Battery Workers Union v. Electric Storage Battery Co.*, 14 Labor Cases, Para. 64, 298, it clearly appears that there was no *requirement* that the employees report for work early, but only that it was the "general practice" that some employees arrive "about" 15 minutes early and that other employees "customarily" arrived "20 to 30 minutes" before the beginning of the shift. Similarly, in the other case of *McLaughlin et al. v. Todd & Brown, Inc.*, 15 Labor Cases, Para. 64-606, it was expressly stated that " * * * There seems to have been *no requirement* that the firemen appear at any specified time before the beginning of their regular work activities", but that they "felt it was a requirement that they should appear *sometime* before 8:00 A. M." It thus follows that neither of these cases are much different from the usual "portal-to-portal" case in which there was no *requirement* that employees report at any specified time and place in advance of regular shifts and that the cases are not authority for application of the Act to situations where, as in this case, such a requirement had been imposed, and by written instructions from the employer.

3. *Respondent's Argument that Activities Involved were Preliminary in Nature.*

Respondent argues, in effect, that the finding of the Court that the activities involved in this case were "preliminary" to their "principal" activities must be sustained and that, in any event, there was no contract to compensate them for such activities. (Resp. Br. pp. 19-22). Appellants are content to stand on the argument of their opening brief, which demonstrates that, as a matter of law, the activities here involved were not "preliminary" in nature, but must be regarded as among the "principal" activities of these employees. (App. Br. pp. 22-32). As stated therein, the official position of the Government is that all preparatory activities which are an integral part of a principal activity *have always been regarded as work and as compensable under the Fair Labor Standards Act, (and) remain so under the Portal Act, regardless of contrary custom or contract.*" (App. Br. p. 29). Thus it follows that the distinction in the Act between future and existing claims was not intended to have any bearing as to such activities, particularly where, as here, the employee was *required* to report at a specified time and place.

4. *Respondent's Argument that Employment at Hourly Rates is Immaterial.*

Respondent next argues that the employment of appellants at hourly rates does not make the activities sued

on compensable and would distinguish two of the cases cited in Appellants' Brief on the ground that they involved written contracts for employment at hourly rates, while in this case there was no written contract. (Resp. Br. pp. 22-24).

It has now been held by this Court that under a written contract an employee is entitled to back wages under the Fair Labor Standards Act for work during lunch periods even though in the past no employee was paid any wages at all for such work outside their regular shifts. *Joshua Hendy Corp. v. Mills*, (C.C.A. 9th), decided September 15, 1948. Although it is recognized that there are certain distinctions to be made from the facts of this case, it is submitted that there is a basic and controlling similarity in comparing such a situation involving a *written* contract for employment at hourly rates, with time and one-half for overtime, *but with a practice of not paying for certain work* and a situation involving an *oral* contract for employment at hourly rates, with time and one-half for overtime, but with a similar practice of not paying for certain work, which are the facts of this case.

In both cases the employees were paid at hourly rates and for all *other* overtime. In neither case were the employees paid any wages whatever for the time spent in the activities in question. Thus the same inference

follows in both cases, i. e., that once it has been determined that the time spent in the activities in question constituted "time worked" within the meaning of the Fair Labor Standards Act, (which is to be considered as a part of the employment contract), the employees are thus entitled to overtime compensation under the terms of such contract and the Portal-to-Portal Act has no application.

On the other hand, respondent makes no attempt to distinguish the remaining case cited in Appellants opening brief (p. 34), that of *Marchant v. Sands Taylor & Wood Co.*, 75 F. Supp. 783, 787, in which an employee employed on a *weekly salary, without a written contract*, was held to be entitled to overtime pay for time spent after the regular closing time and on Saturdays, despite the fact that no such payment had been made previously. It is true that the Court in that case awarded additional half time instead of time and one-half, on the ground that the weekly salary already compensated for straight time. Similarly, it could be contended in this case, if the Court should refuse to allow time and one-half pay for the time in question, it should at least allow additional half-time pay on the basis of the *Marchant* case.

5. *Respondent's Argument that Portal-to-Portal Act Bars Claims Based on Contracts Implied in Fact.*

Respondent argues that the language of Section 2 of the Portal-to-Portal Act in referring to "an express provision of a written or non-written contract" forecloses any recovery based on a contract implied in fact (Resp. Br. p. 24). Respondent also cites three cases to support this contention (Resp. Br. p. 25), but none of them involved facts in which the employees were *required* by their employer to report at a specified time and place in advance of their regular shifts, as in this case.

On the other hand, the case of *Conwell v. Central Mo. Tel. Co.* (W. D. Mo. W. D.), 74 F. Supp. 542, cited in Appellants' opening brief (pp. 36-38), is directly to the contrary and in support of appellants' position in this case. Moreover, the recent decision of the Circuit Court of Appeals for the Second Circuit in *Battaglia v. General Motors Corp.*, (July 8, 1948), 15 Labor Cases, Par. 64, 619, seems to support the same position by the following reference to the Portal-to-Portal Act:

" * * * it left express private contracts *and those implied in fact*, except to the extent that they may be said to have had reference to prior statutory law, untouched and enforceable in the courts as before under applicable legal principles."

See also *Ercole v. Pictorial Research* (N. Y. Sup. Ct., July 16, 1948) 8 W. H. Cas. 138, in which it was held that the Portal-to-Portal Act does not even apply to claims for compensation for travel time when driving the employer's equipment and crew, despite the absence of an express contract, as respondent would define the meaning of that term.

It is thus significant to call attention to the fact that the Courts have not defined this term with the rigidity which respondent would apparently require. Thus in *Timm v. Brown* (Calif.) 178 P. (2d) 10, at p. 15 it is held that

“By ‘express agreement’, in this connection, is meant, not merely a promise, in exact words, to pay a given sum as rental. Any language necessarily imparting an undertaking on the part of the lessee to pay the rent will satisfy the requirements of the rule, for the distinction to which we have referred rests on the nature of the lessee's obligation.”

Again in *Voorheis et al. v. Burell*, 20 Ill. App. 538, at 542, it is held that

“The contract of employment is no less express because the ‘price or ‘amount’ that the party may receive is not agreed upon in advance, but is to depend upon the uncertain result of some business venture or upon some other contingency, which will in the future determine the compensation to be received.”

It is therefore submitted that where, as here, an employee is required by written directions of his employer to report for work at a specified time and place in advance of regular shift changes and to undertake certain duties at that time and place, the requirements of “express contract”, as set forth in the *Timm* and *Voorheis* cases are fully satisfied. Moreover, even if it be held that such is not the case, and without withdrawing this contention, it is next submitted that the *Conwell*, *Battaglia* and *Ercole* cases demonstrate again that the Portal-to-Portal Act was never intended to apply to such a case.

6. *Respondent’s Argument that Recovery in this Case would be a Windfall and would be for Time Outside the Compensable Portion of the Day.*

As to respondent’s argument that recovery in this case would be a “windfall” (Resp. Br. 25), it is sufficient to point out that while there may be such an element in recovery for a claim for walking time or for other “portal-to-portal” time not specifically required by the employer, the situation is far different when, as here, the employer has *required* the employee to report at a specified time and place. Surely payment for such time cannot be considered to be a “windfall” within the meaning of the Act. Nor would such recovery be any more of a “windfall” nature than that allowed in the *Conwell* and *Ercole* cases, *supra*, or by this Court in the

Hendy case, *supra*, for in none of these cases had any payment for the time in question been previously made nor, apparently demanded by the employees.

Similarly, respondent's argument that the time involved in this case was not during the compensable portion of the day, within the meaning of Section 2(b) of the Act, is no more in point in this case than in the *Ercole* or *Hendy* cases, *supra*, where no payment had previously been made for the time involved in those cases, nor did the contracts of employment expressly make such time compensable any more than in this case. It thus must follow that Section 2(b) was not intended to apply to time spent after an employee was *required* by his employer to report at a specified time and place.

7. *Respondent's Argument that Act Constitutional.*

Respondent makes no argument in support of the constitutionality of the Portal-to-Portal Act other than to make reference to the brief filed by the United States as intervenor and the citation of two recent decisions which would uphold the constitutionality of the Act, as a general proposition. From this respondent concludes, in haste, that the Act is constitutional "as applied to the present case." (Resp. Br. p. 27)

But it should be carefully noted that neither of the two cases cited by respondent involved facts similar to

those involved in this case. The case of *Battaglia v. General Motors Corp.* (CCA 2d) 15 Labor Cases, Par. 64, 619, involved claims for walking time, changing clothes, etc. The case of *Fisch v. General Motors Corp.* (CCA 6th) 15 Labor Cases, Par. 64, 674, also involved "walking time and other activities preliminary to actual work," Thus neither case can be regarded as authority for the proposition that the Act is constitutional as applied to a case in which employees were *required* by their employer to report at a specified time and place in advance of shift changes.

Likewise, the brief filed by the United States as intervenor deals wholly with the question of whether the Act is constitutional as a general proposition and is quite evidently a form brief used by the government in other cases under the Act in which the constitutional question had been raised. It wholly fails to discuss or answer the contentions in appellants' brief that even though the Act may be constitutional as a general proposition when applied to the ordinary "portal-to-portal" case involving walking time and other activities *prior to the required time for reporting for work*, the Act is unconstitutional if applied to bar claims for compensation in cases in which employees were *required* by written instructions of their employer to report at a specified time and place in advance of shift changes and were never paid for the intervening time or for their *required*

duties performed therein. Also, on the general question of constitutionality, see Barnett, *The Portal-to-Portal Act of 1947: Direct and Indirect Impairment of Vested Rights*, 27 Or. L. Rev. 274 (June 1948).

CONCLUSION

For the foregoing reasons it is submitted that respondent has failed to answer the contentions set forth in appellants' opening brief and that for the reasons set forth therein it should be held either that the Portal-to-Portal Act has no application to the facts of this case or, if so applied, is unconstitutional and that the judgment of the lower Court should therefore be reversed.

Respectfully submitted,

B. A. GREEN
JAMES LANDYE
GREEN, LANDYE & PETERSON
Attorneys for Appellants.

No. 11890

United States
Circuit Court of Appeals
For the Ninth Circuit

NATIONAL AMERICAN FIRE INSURANCE
COMPANY OF OMAHA, a corporation,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California
Southern Division

FILED

JUN 4 - 1948

PAUL P. O'BRIEN,
CLERK



No. 11890

United States
Circuit Court of Appeals

For the Ninth Circuit

NATIONAL AMERICAN FIRE INSURANCE
COMPANY OF OMAHA, a corporation,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California
Southern Division

EXHIBIT "A"

Subrogation Receipt

\$3850.00

Received of the National American Fire Insurance Co. by the hands of Insurance Associates, San Diego, California, Agent, the sum of Thirty-Eight Hundred *and 50/100* (\$3850.00) Dollars, being in full of all claims and demands for loss and damage by falling aircraft on the September 7, 1945 day of.....19.., to the property insured by Policy No. 671102 issued at San Diego, California Agency of the Company.

And in consideration of such payment the undersigned hereby assigns and transfers to the said Company each and all claims and demands against any person, persons or property, arising from or connected with such loss or damage (and the said Company is subrogated in the place of and to the claims and demands of the undersigned against said person, persons or property in the premises) to the extent of the amount above named.

Dated this 22nd day of September, 1945 at Lemon Grove, California.

/s/ L. CHESTER CLARK

/s/ ELIZABETH A. CLARK

[Endorsed]: Filed July 10, 1947. [6]

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now James M. Carter, United States Attorney for the Southern District of California, and Ronald Walker and Robert Komins, Assistant United States Attorneys for the Southern District of California, and move on behalf of the defendant, United States of America, that the within action be dismissed on the following grounds:

I.

That the Complaint fails to state a claim against the defendant upon which relief can be granted.

II.

That the Federal Tort Claims Act (28 U.S.C., § 921, et seq.) does not authorize the maintenance of suits upon a derivative claim.

III.

That the Anti-Assignment Statute (31 U.S.C.A., § 203) forbids this action which was brought by an insurance company subrogee and assignee.

This motion is based and will be presented upon the records, files and pleadings herein and upon the Memorandum of Points and Authorities attached hereto.

Dated this 30th day of October, 1947.

JAMES M. CARTER,

United States Attorney,

RONALD WALKER and

ROBERT KOMINS,

Assistant U. S. Attorneys,

By /s/ **ROBERT KOMINS,**

Attorneys for Defendant.

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

MILLER, HIGGS, FLETCHER & GLEN,
JOHN W. HOLLER,
726 Bank of America Bldg.,
San Diego 1, Calif.

For Appellee:

JAMES M. CARTER,
United States Attorney,
CLYDE C. DOWNING,
ROBERT KOMINS,
Assistants U. S. Attorney,
600 U. S. Post Office and
Court House Bldg.,
Los Angeles 12, Calif. [1*]

In the District Court of the United States, Southern
District of California, Southern Division

No. 872—Civil

NATIONAL AMERICAN FIRE INSURANCE
COMPANY OF OMAHA,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Plaintiff complains of defendant and alleges:

I.

At all times herein mentioned, plaintiff was a corporation duly organized and existing, and licensed to do and doing business in the State of California as a fire insurance company.

II.

Prior to the 7th day of September, plaintiff issued a certain policy of insurance to L. Chester Clark and Elizabeth A. Clark, husband and wife, under the terms of which policy, plaintiff agreed with the said L. Chester Clark and Elizabeth A. Clark to insure a certain dwelling house, located at 4770 Judson Way, San Diego, California, the property of said L. Chester Clark and Elizabeth A. Clark; that said policy provided, among other things, that plaintiff would insure the said L. Chester Clark and Elizabeth A. Clark up to the sum of Four Thousand Dollars, [2] (\$4,000.00), against damage caused by aircraft or fire, and that should said

dwelling house be damaged by reason of falling aircraft or by fire, this plaintiff would pay the said L. Chester Clark and Elizabeth A. Clark for the loss or damage to the said dwelling house, up to the sum of \$4,000.00; that said policy of insurance was in full force and effect on the 7th day of September, 1945.

III.

That on the 7th day of September, 1945, Frank H. Dean, Jr., was a commissioned officer in the United States Navy, to wit, a lieutenant, and that he was on said date, attached to the United States Naval Auxiliary Air Station, Brown Field, San Diego County, California, and that on said date, and while he was acting in the line of duty, operating and flying a certain airplane belonging to the defendant herein, the said Lieutenant Frank H. Dean, Jr., piloted and operated the said airplane in such a negligent, careless and reckless manner as to cause the same to crash and collide with and strike the said dwelling house, belonging to the said L. Chester Clark and Elizabeth A. Clark, thereby injuring, damaging and destroying the same by such crash and collision and a resultant fire immediately occasioned thereby.

IV.

That as a direct and proximate result of said careless, negligent and reckless piloting and operating of said airplane, as aforesaid, the said dwelling house belonging to L. Chester Clark and Elizabeth A. Clark was damaged in the sum of Three Thousand Eight Hundred and Fifty Dollars (\$3,850.00).

V.

By reason of said policy of insurance as aforesaid, and by reason of the damage to said dwelling house as aforesaid, plaintiff [3] became obligated to and did pay to the said L. Chester Clark and Elizabeth A. Clark, the sum of \$3,850.00, which was then and there and is the amount of damage to the property insured under the terms of the aforementioned policy.

VI.

That on the 22nd day of September, 1945, the said L. Chester Clark and Elizabeth A. Clark did assign to plaintiff, each and all claims and demands against any person, persons or property arising from or connected with the above-mentioned loss and damage to the extent of the sum of \$3,850.00; that a copy of said assignment is attached hereto, marked "Exhibit A," and made a part hereof by reference.

Wherefore, plaintiff prays judgment against said defendant, for the sum of \$3850.00, together with court costs, and that in the event the court renders a judgment herein in favor of plaintiff, that the court, as a part of said judgment, allow reasonable attorneys' fees in accordance with the provisions of and as provided by Section 422 of the Federal Tort Claims Act.

MILLER, HIGGS, FLETCHER
& GLEN and

JOHN W. HOLLER,

By /s/ JOHN W. HOLLER. [4]

State of California,
County of San Diego—ss.

John W. Holler, being first duly sworn, deposes and says: That he is an attorney at law admitted to practice before all courts of the State of California, and has his office in San Diego, San Diego County, California, and is one of the attorneys for plaintiff in the above-entitled matter; that plaintiff is a corporation and none of its officers are within the County where plaintiff's attorneys have their office, and for that reason affiant makes this verification on plaintiff's behalf; that he has read the foregoing Complaint, and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated on information or belief; and as to those matters that he believes it to be true.

/s/ JOHN W. HOLLER.

Subscribed and sworn to before me this 12th day of July, 1947.

/s/ [Illegible]

Notary Public in and for the
said County and State.

EXHIBIT "A"

Subrogation Receipt

\$3850.00

Received of the National American Fire Insurance Co. by the hands of Insurance Associates, San Diego, California, Agent, the sum of Thirty-Eight Hundred *and 50/100* (\$3850.00) Dollars, being in full of all claims and demands for loss and damage by falling aircraft on the September 7, 1945 day of.....19.., to the property insured by Policy No. 671102 issued at San Diego, California Agency of the Company.

And in consideration of such payment the undersigned hereby assigns and transfers to the said Company each and all claims and demands against any person, persons or property, arising from or connected with such loss or damage (and the said Company is subrogated in the place of and to the claims and demands of the undersigned against said person, persons or property in the premises) to the extent of the amount above named.

Dated this 22nd day of September, 1945 at Lemon Grove, California.

/s/ L. CHESTER CLARK

/s/ ELIZABETH A. CLARK

[Endorsed]: Filed July 10, 1947. [6]

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now James M. Carter, United States Attorney for the Southern District of California, and Ronald Walker and Robert Komins, Assistant United States Attorneys for the Southern District of California, and move on behalf of the defendant, United States of America, that the within action be dismissed on the following grounds:

I.

That the Complaint fails to state a claim against the defendant upon which relief can be granted.

II.

That the Federal Tort Claims Act (28 U.S.C., § 921, et seq.) does not authorize the maintenance of suits upon a derivative claim.

III.

That the Anti-Assignment Statute (31 U.S.C.A., § 203) forbids this action which was brought by an insurance company subrogee and assignee.

This motion is based and will be presented upon the records, files and pleadings herein and upon the Memorandum of Points and Authorities attached hereto.

Dated this 30th day of October, 1947.

JAMES M. CARTER,

United States Attorney,

RONALD WALKER and

ROBERT KOMINS,

Assistant U. S. Attorneys,

By /s/ **ROBERT KOMINS,**

Attorneys for Defendant.

NOTICE OF MOTION

To: The plaintiff above named and Miller, Higgs,
Fletcher & Glen & John W. Holler, its attor-
neys:

You and each of you will please take notice that the defendant, United States of America, by and through the undersigned, will bring the above and foregoing motion on for hearing before the above-entitled Court in the Courtroom of the United States District Court in the United States Customs and Court House, 325 West "F" Street, San Diego, California, on Monday, November 10, 1947, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated at Los Angeles, California, this 30th day of October, 1947.

JAMES M. CARTER,

United States Attorney,

RONALD WALKER and

ROBERT KOMINS,

Assistant U. S. Attorneys,

By /s/ ROBERT KOMINS,

Attorneys for Defendant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Oct. 31, 1947. [9]

In the District Court of the United States in
and for the Southern District of California,
Southern Division

No. 872—Civil

NATIONAL AMERICAN FIRE INSURANCE
COMPANY OF OMAHA,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Honorable Leon R. Yankwich, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEED-
INGS ON MOTION OF DEFENDANT TO
DISMISS

San Diego, California, November 10, 1947

10:00 A.M.

Appearances:

For the Plaintiff: Miller, Higgs, Fletcher & Glen;
by John W. Holler, Esq.

For the Defendant: Robert Komins, Esq. [11]

The Court: I think I can save you a great deal
of time. I am of the view that this statute, being
in derogation of the sovereignty, does not apply
except to the individuals themselves. It does not
apply to subrogated claims, because the Congress
of the United States did not say so.

Mr. Holler: I realize it is a close question. It
is my understanding that there is now on appeal,

to the Circuit Court of Appeals, a decision from a department of this court, wherein a judge in Los Angeles held according to the statement your Honor has just made.

I would suggest, if it meets with the approval of this Court, that this matter go off calendar pending the outcome of that appeal. Then, if that appeal is such that it indicates we have no standing in court, that will settle it once and for all. If, on the other hand, the decision of the Los Angeles court should be reversed, then we would have, I believe, a good cause of action. There is in this particular complaint an allegation of an assignment. The assignment undoubtedly is void under the statute, but in that case we contend it should be, and could be, treated as surplusage. I would therefore ask that this be postponed until the outcome of the appeal.

The Court: That appeal would not decide this question, [12] because the court might refuse to allow the person to intervene as a party in interest, on other grounds. You know how the higher courts are. They don't rule on the merits unless they have to.

In the first place, permission to intervene is not obligatory. The court may allow a person who has an interest to intervene, and the court might decide that case upon the proposition, regardless of the ground the court took, that it was not the court's province to allow another person to intervene in the action.

Mr. Holler: I am not familiar with the proceeding taken up there.

The Court: It is right here. They have attached it to the memorandum. It says, "leave to intervene as parties plaintiff in this action be and is hereby denied." "Intervene" does not mean "substitution." It means "intervenire,"—to come between. The right to intervene is not obligatory. Therefore, the opinion of Judge Mathes might be sustained upon that ground, without getting down to the proposition involved. Here we have a subrogee suing in his own right.

Mr. Holler: On the contrary, it might be that this very point will be decided.

The Court: When I am satisfied that my decision is right, I never postpone a matter to await the decision of [13] the higher courts.

For instance, to show you my attitude, a gentleman whom you all know, J. Edward Keating, an old-time practitioner, years ago induced two judges of the District Court to say that a certain statute does not provide a penalty. The cases were appealed, but an Eastern Circuit repudiated them, and in an opinion in which certiorari was denied, the court held that the statute does provide a penalty, and was valid.

Recently one of our judges, because he was not bound to follow the Circuit, ruled to the contrary. In other words, he held these two decisions, one by Judge Trippett, expressed his view.

I have declined to continue any of the cases involving the same offense, in my court, because I do not agree with the opinion of the other judges. In other words, all judges of our court are respon-

sible for their own rulings, unless we agree, as a policy of the court, we should make a certain ruling, and then we are bound by that ruling, whether we agree with it or not. Because of my policy, and also because Judge Mathes' case may be decided on another point, I decline to follow it. You cannot be harmed by this, because it does not cut off the statute of limitations. You will be protected. As a matter of fact, I have held that you can choose whichever statute you want,—one year from January, 1946, or a year from August 2, 1946, which is the date it [14] went into effect.

Mr. Komins: The statute would run in this case, your Honor.

Mr. Holler: Yes, it is my understanding that the statute ran the 2nd of August, of this year.

The Court: The statute would not run if you protected your rights by instituting an appeal, and ran it along. The statute does not run against the action of the court erroneously dismissing a case.

Mr. Holler: I presume, in view of your Honor's remarks, your Honor has made some study of this section. I have no authorities. As you know, there has not been an interpretation on this point.

The Court: I am familiar with the proposition. The same principle has been applied right along. This is a deviation, not of the common law, but a deviation from the governmental principle that the government cannot be sued except with its own consent. Whether we deal with any of the acts, beginning with the Federal Tort Claims Act, the Tucker Act, or the Miller Act, which were all acts

which gave persons the right to sue, courts have held that only the persons specifically named have the right. That others, deriving from them either by agreement or otherwise, are not covered by the Acts. I could write an opinion that would cover 15 pages, and probably give you 50 citations, and reiterate what the French call *verite a la Palisse*. And that is a well known and accepted principle.

Mr. Holler: I would like to point out this portion of the statute, if the Court please. As you know, it is provided that in certain cases that the United States is liable for tort claims, and it goes on to say that the government shall be liable "on account of damage to, or loss of property or on account of personal injury or death caused by the negligence or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury," etc.

Not the person who was injured, but the claimant. We are in this case the claimant, the subrogee, and under the law of the State of California we are automatically substituted in the shoes of the injured party.

The Court: I think Mr. Komins made exactly the same argument in favor of the proposition that the statute of limitations of the State of California should apply. I ruled that that was merely a general statement, which does not make the law of California binding upon us, because when we are

dealing with relations between the sovereign and the individual, the only law that governs is the law of the United States. The law of negligence, or lack of negligence, or contributory [16] negligence, would be governed by the law of the forum. But the right of anyone to sue is governed, just as the statute of limitations is governed, by what the statute says, and only those persons who are specifically authorized to sue can sue. That clause is not broad enough to write in the law of the State of California, because if that were true my opinion in the other case would be incorrect.

Mr. Holler: There is one point which I respectfully suggest your Honor overlooks. That is, the statute does not say the injured party may sue. It says the claimant. If the United States would be liable as a private person, under the laws of this jurisdiction, then the United States is liable in this case. As I say, we are the claimant here.

Mr. Komins: If the Court please, plaintiffs have filed a memorandum in this matter, where they admit the Federal Tort Claims Act does not expressly grant consent to sue by the claimant. In the case of *United States vs. Sherwood*, 312 U.S., 584, the court pointed out that it is not a matter of procedure, but of jurisdiction. There is no language in the Act itself which permits a suit by a subrogee or an assignee. I would like to point out that in the case of *Offer vs. Superior Court*, 194 Cal., 114, which counsel for the plaintiff has cited in his memorandum, the court treated the subrogee as a sort of assignee by equity. There is no difference so far as the statute is concerned. So we have

the [17] double objection, both as to the strict construction of a waiver of immunity, as well as a violation of the anti-assignment statute, which counsel admits is objectionable, and will eliminate that theory of the case from his complaint. There is no consent by the government to be sued by anybody but the party himself.

Mr. Holler: I respectfully submit that is not what the statute says.

Mr. Komins: Further reference to the Sherwood case indicates that the Federal Rules of Civil Procedure do not delegate any substantive rights against the government, despite any wording in the Tort Claims Act. It does not enlarge any right against the government, to which it has not consented. Your Honor is well acquainted with the cases which hold that District Courts are courts of limited jurisdiction, and where no jurisdiction exists it cannot be conferred on the court, even with the consent of the parties. And this is strictly a jurisdictional question.

The Court: In the opinion to which I referred, *Sweet vs. United States*, 71 Fed Sup., 863, I said:

“This statute is the Government’s consent to be sued in certain actions where heretofore action would not lie against it.”

Then I refer to the very section read to me, saying

“Subject to the provisions of * * * the same [18] claimants, in the same manner, and to the same extent as a private individual under like circumstances,”

and I point to the fact:

“This paragraph followed the paragraph which gave jurisdiction to the United States District Courts to such actions accruing on and after January 1, 1945,”

And I state:

“Counsel for the Government would take a portion of Section 410 and tie this action to the California statute of limitations, which, for torts, is one year.”

Then I hold why in my opinion this is not so, because the Congress has provided a Statute of Limitations, and this section does not enlarge jurisdiction. It says:

“Subject to the provisions of this chapter, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine and render judgment on any claim against the United States, for money only, occurring on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligence or wrongful act or omission of any employee of the [19] Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage,

loss, injury, or death in accordance with the law of the place where the act or omission occurred.”

So it clearly contemplates an individual action by a person who is actually damaged. Subrogation is a statutory creation.

In view of the specific provision which repudiates assignments, and certainly indirect assignment allowed by equity would also be included in that,—the motion to dismiss will be granted. [20]

Certificate

I hereby certify that I am duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 12th day of January A.D., 1948.

/s/ HENRY A. DENING,
Official Reporter.

[Endorsed]: Filed Jan. 27, 1948. [21]

[Title of District Court and Cause.]

ORDER DISMISSING ACTION

The within cause having come on for hearing on November 10, 1947, at ten o'clock a.m., on defendant's motion to dismiss the within action on the

following grounds, to wit: (1) that the Complaint fails to state a claim against the defendant upon which relief can be granted, (2) that the Federal Tort Claims Act (28 U.S.C., § 921, et seq.) does not authorize the maintenance of suits upon a derivative claim, and (3) that the Anti-Assignment Statute (31 U.S.C.A., § 203) forbids this action which was brought by an insurance company subrogee and assignee.

And the Court having heard the argument of counsel and being fully advised finds that the defendant's motion to dismiss upon the aforementioned grounds, and each of them, is well taken and that it should be granted.

It is, therefore, hereby ordered, adjudged and decreed that the defendant's motion to dismiss, above referred to, be and it is hereby granted, and that the within action be and the same is hereby dismissed.

Dated: November 21, 1947.

/s/ LEON R. YANKWICH,

United States District Judge.

Approved as to form, pursuant to Rule 7, Local Rules, Southern District of California.

MILLER, HIGGS, FLETCHER
& GLEN and

JOHN W. HOLLER,

By /s/ JOHN W. HOLLER,

Attorneys for Plaintiff.

[Endorsed]: Filed and Judgment entered Nov. 21, 1947. Docketed Nov. 26, 1947; book 13, page 33.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that National American Fire Insurance Company of Omaha, Plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth District, from the final judgment entered in this action on November 21, 1947, and from the whole of said judgment.

Dated: January 14, 1948.

MILLER, HIGGS. FLETCHER
& JOHN W. HOLLER,

By /s/ JOHN W. HOLLER,

Attorneys for said Plaintiff.

[Endorsed]: Filed and copy mailed to James M. Carter, U. S. Attorney, Feb. 24, 1948. [23]

[Title of District Court and Cause.]

DESIGNATION OF RECORD PROCEEDINGS
AND EVIDENCE TO BE CONTAINED IN
RECORD ON APPEAL

To Edmund L. Smith, Clerk of the Above-Entitled
Court:

Please take notice that Plaintiff, National American Fire Insurance Company of Omaha, has appealed to the Circuit Court of Appeals for the Ninth District from that certain final judgment entered in this action on November 21, 1947, and from the whole of said judgment;

And it is hereby requested that you prepare, or cause to be prepared a record on Appeal in the above-entitled cause, including therein the Judgment Roll, Plaintiff's Complaint, Defendant's Motion to Dismiss, the Order of the above-entitled Court dismissing said action, the Notice of Appeal and this Notice.

Dated: February 21, 1948.

MILLER, HIGGS, FLETCHER
& JOHN W. HOLLER,

By /s/ JOHN W. HOLLER,

Attorneys for said Plaintiff.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Feb. 24, 1948. [25]

[Title of District Court and Cause.]

APPELLEE'S COUNTER-DESIGNATION OF
ADDITIONAL PORTIONS OF THE REC-
ORD, PROCEEDINGS AND EVIDENCE
TO BE INCLUDED IN RECORD ON AP-
PEAL

The plaintiff-appellant, National American Fire Insurance Company of Omaha, having heretofore filed a designation of record, proceedings and evidence to be contained in record on appeal, the defendant-appellee, United States of America, hereby designates the following additional portions of the record, proceedings and evidence to be included in the record on appeal:

1. Reporter's Transcript of Proceedings of November 10, 1947, on motion of defendant to dismiss.
2. This counter-designation.

JAMES M. CARTER,

United States Attorney,

CLYDE C. DOWNING and

ROBERT KOMINS,

Assistant U. S. Attorneys,

By /s/ ROBERT KOMINS,

Attorneys for Defendant-Appellee.

[Affidavit of service by mail attached.]

[Endorsed]: Filed March 8, 1948. [27]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 27, inclusive, contain full, true and correct copies of Complaint; Motion to Dismiss; Reporter's Transcript of Proceedings on Motion to Dismiss; Order Dismissing Action; Notice of Appeal; Designation of Record on Appeal and Counter-Designation of Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the notation of the filing of the Order Dismissing Action was made in the civil docket on November 26, 1947.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$6.90 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 1st day of April, A.D. 1948.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy Clerk.

[Endorsed]: No. 11890. United States Circuit Court of Appeals for the Ninth Circuit. National American Fire Insurance Company of Omaha, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Southern Division.

Filed April 2, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11890

NATIONAL AMERICAN FIRE INSURANCE
COMPANY OF OMAHA,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

Appellant intends to rely upon the following points on the Appeal of the above-entitled cause:

I.

That the District Court of the United States, in and for the Southern District of California, Southern Division, erred in dismissing appellant (plaintiff's) complaint for the following reasons:

- (a) Said complaint states a good and sufficient cause of action against defendant.
- (b) That the Federal Tort Claims Act (28 U.S.C., Sec. 921 et seq.) does authorize the maintenance of suits upon a derivative claim.
- (c) The Anti-Assignment Statute (31 U.S.C.A. 203) has no application to the claim of a subrogee under the Federal Tort Claims Act.

Dated this 6th day of April, 1948.

MILLER, HIGGS, FLETCHER
& JOHN W. HOLLER,

By /s/ JOHN W. HOLLER.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

Appellant hereby designates the entire record as certified to you as necessary for the consideration of this appeal, and requires that you cause the entire transcript of such record to be printed.

Dated this 6th day of April, 1948.

MILLER, HIGGS, FLETCHER
& JOHN W. HOLLER,

By /s/ JOHN W. HOLLER.

[Affidavit of service by mail attached.]

[Endorsed]: Filed April 8, 1948.

No. 11890

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

NATIONAL AMERICAN
FIRE INSURANCE
COMPANY OF OMAHA,

Appellant,

VS.

UNITED STATES OF
AMERICA,

Appellee.

APPEAL FROM
UNITED
STATES
DISTRICT COURT

—
HON. LEON R.
YANKWICH,
JUDGE

APPELLANT'S OPENING BRIEF

MILLER, HIGGS and FLETCHER
JOHN W. HOLLER

726 Bank of America Building
San Diego 1, California

Attorneys for Appellant

FILED

JUN 23 1948

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATIONAL AMERICAN
FIRE INSURANCE
COMPANY OF OMAHA,

Appellant,

vs.

UNITED STATES OF
AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

Jurisdiction

(a) *Of the district court.* This action was filed in the district court by the plaintiff and appellant against the appellee, United States of America, under the Federal Tort Claims Act.¹ Under Sec. 931 of the Act, exclusive jurisdiction of such actions is vested in the district courts.

¹ Chapter 753, Title IV, Public Law 601, Sec. 401 *et seq.*; 28 U.S.C.A., Sec. 921 *et seq.* (August 2, 1946), hereinafter referred to as "the Act." Except where otherwise indicated, section references will be to the U. S. Code citation.

(b) *Of the Circuit Court of Appeals.* Appellant has taken this appeal from an order dismissing its action. Sec. 933 of the Act provides that final judgments in the district court are subject to review by appeal—

“(1) in the circuit courts of appeals in the same manner and to the same extent as other judgments of the district courts.”

The order dismissing the action was docketed on November 26, 1947, and the notice of appeal was filed February 24, 1948.

Statement of the Case

This is an appeal from an order of the court below dismissing plaintiff's complaint. The complaint alleges that plaintiff, a fire insurance company, insured a dwelling house in San Diego, California, against damage caused by aircraft or fire. While the policy was in force, an airplane belonging to the defendant, being piloted in a negligent manner by a commissioned officer in defendant's service, crashed into the house. The house was damaged and destroyed by the collision and resultant fire. It is also alleged that the proximate cause of the crash was the negligent manner in which the airplane was piloted and operated.

By reason of the damage and pursuant to the terms of the policy, plaintiff became obligated to and did pay its insureds, L. Chester Clark, and

Elizabeth A. Clark, the sum of \$3,800.00. The complaint prays damages from defendant in that amount.

Defendant's motion to dismiss was granted on the grounds:

1. That the complaint fails to state a claim against the defendant upon which relief can be granted.

2. That the Federal Tort Claims Act (28 U.S.C., Sec. 921 *et seq.*) does not authorize the maintenance of suits upon a derivative claim, and

3. That the Anti-Assignment Statute (31 U.S.C.A., Sec. 203) forbids this action which was brought by an insurance company, subrogee and assignee. (Tr. P. 17).

Specification of Errors

The District Court erred:

1. In holding that the complaint fails to state a claim against the defendant upon which relief can be granted.

2. In holding that the Act does not permit suits by Subrogees.

3. In holding that the Anti-Assignment Statutes (31 U.S.C.A., Sec. 203) which prohibits the assignment of claims against the United States is applicable to subrogated claims.

Argument

I. THE COMPLAINT STATES A CAUSE OF ACTION AGAINST THE DEFENDANT.

The complaint alleges ownership by defendant of the instrumentality causing damage, the operation by a commissioned officer in defendant's service, his negligence in its operation proximately causing the damage, and the amount of the damage. The complaint further alleges that plaintiff was the insuror of the property damaged and paid the sum claimed by reason of the damage.

The complaint further alleges that prior to the commencement of the action, L. Chester Clark and Elizabeth A. Clark assigned their claim to plaintiff to the extent of \$3,800.00, but, as will be pointed out later, this assignment is of no significance for the reason that upon payment of the loss, plaintiff was by operation of law, subrogated to the rights of its insured and the allegation of the assignment is mere surplusage.

II. BY ITS BROAD LANGUAGE THE ACT AUTHORIZES MAINTENANCE OF SUITS UPON DERIVATIVE CLAIMS.

A. THE PERTINENT PROVISIONS OF THE ACT

1. *Suits on tort claims.* Section 931 of the Act provides that suit may be brought against the Government in the district court on all claims whether for more or less than \$1,000.²

B. THE PLAIN MEANING OF THE ACT

Looking only at the words used in the Act and considering the question without reference to practical construction, the history of the Act or prior administrative rulings, it is submitted that the language used is so broad that it must be deemed to include subrogated claims. The Act confers jurisdiction on the district court to hear and render judgment "on any claim * * * under circumstances where the United States, if a private person, would be liable to the claimant for such damage * * *"; and further that the Government shall be liable for "such

² The pertinent portions of Sec. 931 of the Act provide: " * * * the United States district court for the district wherein the plaintiff is resident or wherein the act * * * complained of occurred * * * shall have exclusive jurisdiction to hear, determine and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent * * * act * * * of any employee of the Government while acting within the scope of his * * * employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage * * * in accordance with the law of the place where the act or omission occurred. * * * the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances * * *."

claims, to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances * * *."

As said by the Attorney General (36 Op. Atty. Gen. 553) in ruling that similar language in a prior tort claims statute (31 U.S.C.A., Sec. 215), commonly referred to as the "Small Tort Claims Act" included subrogation claims:

"Assuming that such a statute is to be strictly construed because in derogation of the immunity of the sovereignty, a strict construction does not permit reading into the statute something that is not there or disregarding its plain terms. The words of the statute include all claims and all claimants."

In view of this Court's decision in *Employers' Fire Insurance Company, etc. v. United States of America, Charles Rusconi, et al*, No. 11,743, decided April 8, 1948, we feel it would be an unnecessary infringement upon the Court's time to further extend this brief on the points therein decided, since it has been squarely held by this Court that the Act authorizes suits upon derivative claims.

III. THE ANTI - ASSIGNMENT STATUTE (31 U.S.C.A., SEC. 203) IS INAPPLICABLE TO SUBROGATED CLAIMS.

This section provides—

"All transfers and assignments made of any claim upon the United States * * * shall be absolutely null and void * * *."

This Court has held in the Rusconi case (*Supra.*) that this statute does not apply to transfer of title by operation of law.

Prior to the commencement of this action plaintiff's insureds assigned their claim to plaintiff to the extent of the amount paid by plaintiff. This, however, was an idle act and of no significance and the pleading of this assignment should be treated as surplusage. Plaintiff's claim against defendant arose by operation of law. It was complete and a cause of action existed at the moment of payment (*Offer v. Superior Court*, 194 Cal. 114, 228 Pac. 11).

Respectfully submitted,

MILLER, HIGGS & FLETCHER,
JOHN W. HOLLER,

726 Bank of America Building,
San Diego 1, California,
Attorneys for Appellants.

No. 11890

**In the United States Circuit Court of
Appeals for the Ninth Circuit**

**NATIONAL AMERICAN FIRE INSURANCE COMPANY OF OMAHA,
A CORPORATION, APPELLANT**

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

MEMORANDUM FOR THE UNITED STATES

A. DEVITT VANECH,

Assistant Attorney General.

ROGER P. MARQUIS,

*Attorney, Department of Justice,
Washington, D. C.*

FILED

AUG 24 1948

PAUL P. O'BRIEN,

CLERK

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11890

NATIONAL AMERICAN FIRE INSURANCE COMPANY OF OMAHA,
A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA*

MEMORANDUM FOR THE UNITED STATES

This action was dismissed by the district court on the ground that the claim of an insurer as subrogee to the rights of its assured was not one on which relief could be granted under the Federal Tort Claims Act, 28 U. S. C. secs. 921-946. That view has since been rejected by this Court in *Employers Fire Insurance Co. v. United States*, 167 F. 2d 655 (April 8, 1948). It was there held that an insurer was entitled to intervene as subrogee in a suit brought by its assured against the United States, with the result that the insurer and assured were before the court in a single suit. It is the position of the United States that under the Federal Tort Claims Act, such joinder is necessary or the suit must be brought in the name of the assured. The United States has not consented to the splitting of a cause of action against it under that act; yet if an insurance company were allowed to sue alone as subrogee, a judgment in its favor could not prevent the assured or other insurers from recovering further damages in other suits on the same cause of

action. Such suits might even be brought in several districts, under the provision for venue at the residence of the plaintiff. 28 U. S. C. sec. 931. In addition, to permit separate suits by the insurer and the insurer would present problems as to the Government's rights to assert set-offs and counterclaims it might have.

Since the present complaint was dismissed in the court below for failure to state a cause of action, the question of joinder was not there dealt with. It is consequently deemed inappropriate to present at this time an extensive argument in support of the Government's position, but it is called to the attention of the Court in the belief that the Court should be advised of it in making disposition of this appeal.

Respectfully submitted,

A. DEVITT VANECH,
Assistant Attorney General.
 ROGER P. MARQUIS,
Attorney, Department of Justice,
Washington, D. C.

AUGUST 1948

No. 11891

United States
Circuit Court of Appeals
For the Ninth Circuit.

ERNEST TSANG,

Appellant,

vs.

JOHN JOSEPH KAN,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

MAY 21 1948

PAUL P. O'BRIEN,
CLERK

No. 11891

United States
Circuit Court of Appeals
For the Ninth Circuit.

ERNEST TSANG,

Appellant,

vs.

JOHN JOSEPH KAN,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Northern District of California.
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San Francisco, California.

Attorney for Petitioner and Appellee.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 25864-R

JOHN JOSEPH KAN, Veteran,

Petitioner,

vs.

ERNEST TSANG, a General Partner, L. M. CAR-
TER, GEORGE CHEW, GEORGE CHIN,
PHILIP FONG, FRED LEONG and PAUL
YUKE, Limited Partners, doing business under
the name of Cathay House,

Respondents.

PETITION

The petition of John Joseph Kan respectfully
alleges that:

1. This is a petition under Section 8 of the Selec-
tive Training and Service Act of 1940, As Amended,
and the jurisdiction of this Court is based on that
Act;

2. Petitioner is a resident of the City and County
of San Francisco, State of California, residing at
1060 Powell Street, thereof;

3. Respondents are now a copartnership consist-
ing of Ernest Tsang, a General Partner, L. M.
Carter, George Chew, George [1*] Chin, Philip

* Page numbering appearing at foot of page of original certified
Transcript of Record

Fong, Fred Leong and Paul Yuke, together with petitioner and Helen Kan, his wife, as limited partners, and maintains a place of business known as the "Cathay House" at 718 California Street, San Francisco, California; that the time petitioner left the employment of respondents it was a corporation and was changed to a copartnership while petitioner was in the Army of the United States;

4. That on or about the 23rd day of July, 1943, at San Francisco, California, petitioner was inducted into the military service of the United States and thereupon entered into said service;

5. That immediately prior to petitioner's entrance into said service he was employed by the aforesaid corporation as a General Manager thereof at a salary of \$500 per month;

6. That petitioner left his aforesaid position on or about the 23rd day of July, 1943, for the purpose of entering into the military service of the United States;

7. Petitioner satisfactorily completed his said period of service in the Army of the United States on the 26th day of November, 1943, and on that date received an honorable discharge evidencing such satisfactory completion;

8. That within ninety days after petitioner was released from said Army services, petitioner made application to respondent for restoration to the position hereinabove described;

9. That petitioner is qualified to perform the duties of said position as set forth under the law and said position that he occupied prior to his entrance into the said military service and it was not a temporary one;

10. That respondents decline and refuse, and still decline and refuse to reemploy petitioner and to restore him to his said position, and further decline and refuse to restore him to his same [2] status and pay as he occupied and received prior to his entrance into the said military service, and by reason thereof have violated the provisions of the Selective Training and Service Act of 1940 and the Service Extension Act of 1941.

Wherefore petitioner prays that the respondents be specifically required to comply with the provisions of the Selective Training and Service Act of 1940, As Amended, and with the Service Extension Act of 1941 by reinstating the petitioner to the position of General Manager of the Cathay House and to compensate the petitioner for loss of wages and benefits suffered by reason of the respondents' unlawful action.

JOHN JOSEPH KAN,
Petitioner.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Petitioner.

State of California,
City and County of San Francisco—ss.

John Joseph Kan, being first duly sworn, deposes and says:

That he is the petitioner described and who executed the above and foregoing complaint; that he has read the same and knows the contents thereof and the same are true.

JOHN JOSEPH KAN.

Subscribed and sworn to before me this 17th day of April, 1946.

[Seal] FRANCIS ST. J. FOX,
United States Commissioner for the
Northern District of California.

[Endorsed]: Filed April 18, 1946. [3]

[Title of District Court and Cause.]

ANSWER OF RESPONDENT ERNEST TSANG
TO PETITION UNDER SECTION 8, SE-
LECTIVE TRAINING AND SERVICE ACT

Answering the petition of John Joseph Kan, the respondent Ernest Tsang admits, denies and alleges as follows:

First Defense
(Another action pending.)

This respondent alleges that there is now pending before another court another action between the same parties and involving the same subject matter, the determination of which other action will be res

judicata as to all issues of fact and law in the present action and will be a complete bar to all relief sought in the petition on file in the within case, namely that certain action entitled "Ernest Tsang, plaintiff, vs. John Kan, defendant," (being the same persons who are parties in the present action) number 333,586 in the Superior Court of the State of California, in and for the City and County of San Francisco, which action was commenced on October 21, 1944 by the filing of a certain complaint, to which said John Kan filed [4] his certain answer and cross-complaint therein on December 15, 1944, and wherein a judgment and decree of said Superior Court was duly and regularly made and entered on December 21, 1945, from which said Kan appealed to the District Court of Appeal of the State of California in and for the First Appellate District on January 29, 1946, and which said action on said appeal ever since has been and now is pending in said District Court of Appeal, and numbered therein 1 Civil No. 13,111.

Second Defense
(Res judicata.)

This respondent alleges that each and every issue of fact and law presented by the petition on file herein already has been adjudicated and determined by a duly constituted court of law and equity having full jurisdiction of the persons of said John Joseph Kan and Ernest Tsang and of said subject matter, namely, that certain judgment and decree of the Superior Court of the State of California, in and

for the City and County of San Francisco, entitled "Ernest Tsang, plaintiff and cross-defendant, vs. John Kan, defendant and cross-complainant" (being the same persons who are parties in the present action), number 333,586, which said judgment and decree was duly made and entered on December 21, 1945 and determined and adjudicated, amongst other things, that said Kan "has no right to be employed by said corporation (The Cathay House), partnership (The Cathay House) or plaintiff (Ernest Tsang), and that said corporation, partnership and plaintiff are not obligated to employ defendant in any manner whatsoever. Cross-defendant (Tsang) is entitled to judgment on the cross-complaint and that cross-plaintiff take nothing."

Third Defense

This respondent alleges that said petition does not state sufficient facts to constitute a cause of action against [5] this respondent, and even if the facts therein alleged were true, which this respondent denies, said appellant would not be entitled to any relief from this respondent.

Fourth Defense

I.

This respondent alleges that immediately prior to July 23, 1943 this respondent was the president of The Cathay House, a California corporation, conducting a restaurant business at 718 California Street, San Francisco, California; that said peti-

tioner was an employee of said corporation and was being paid for all of his services as such, at the rate of \$500 per month; that said rate of compensation was fixed by the management of said corporation and the term of the employment was at the pleasure of the board of directors of said corporation, subject to immediate termination at any and all times and without notice of any kind; that petitioner's services at that time were wholly unsatisfactory to the board of directors of said corporation and to this respondent who as the owner of more than one-half of the stock thereof held the controlling interest therein; that said petitioner was at that time and for a long time theretofore had been on the verge of having his employment terminated by the corporation because of the last mentioned facts and was only being temporarily retained in the hope of the board of directors and of this respondent that said petitioner would mend his ways and make a conscientious effort to become a suitable and desirable employee, which for a considerable time theretofore he had not been. Prior to November 26, 1943, said corporation disposed of all of its interest in said restaurant business and ever since has been entirely inoperative and doing no business of any kind or character with no need or use for any employees to perform any of the services which said petitioner was ever employed by said corporation to perform. [6]

II.

Shortly after November 26, 1943, said petitioner inquired of this respondent as to the willingness of

this respondent as general manager of The Cathay House, a limited partnership, then operating a restaurant business in the premises previously occupied and operated by said corporation, to employ said petitioner in said business but demanded as absolute conditions precedent to any such employment that his rate of compensation be \$750 per month and that he be given a written contract guaranteeing his employment for a period of the next succeeding three years regardless of whether said employee's services would be satisfactory and even regardless of whether he performed any services at all. No other or different demand or request was made or presented by said petitioner to this respondent at any time within ninety days after November 26, 1943, or otherwise. Within said ninety day period this respondent on behalf of said partnership offered, without any legal or moral obligation so to do but only as a kindly effort, to employ said petitioner to do similar duties to those for which he had been employed by said corporation and upon the same basis, namely, \$500 per month, and with unspecified term, and additionally assuring said petitioner that if he would make a conscientious effort to work for the benefit of said partnership, including himself, this respondent would do everything possible to make said employment congenial, permanent and profitable to said petitioner, but said petitioner refused to accept any employment upon that basis or any other basis that did not include the two prerequisites which he had demanded as above alleged.

III.

Answering paragraph III, this respondent denies that there is now or at any time during the pendency of the within [7] action there has been a partnership consisting of Ernest Tsang, L. M. Carter, George Chew, George Chin, Philip Fong, Fred Leong and Paul Yuke, together with John Joseph Kan and Helen Kan.

IV.

This respondent denies that said petitioner ever was or now is in his employment.

V.

Further answering paragraph III, this respondent alleges that he has no knowledge or belief that any corporation was ever changed to any partnership at any time.

VI.

Answering paragraph V, this respondent denies that said petitioner was ever employed by any corporation as a general manager.

VII.

Answering paragraph VIII, this respondent denies that said petitioner ever made application to him for employment by this respondent of any kind and upon any terms or basis whatsoever.

VIII.

Answering paragraph IX, this respondent alleges that said petitioner is not qualified to perform the duties of and is not a fit and proper person for employment by this respondent and that the position

which said petitioner had with The Cathay House; a corporation, prior to on or about July 23, 1943, was a temporary one.

IX.

Answering paragraph X, this respondent denies the allegations contained therein.

Wherefore, respondent prays that it be ordered, adjudged and decreed as follows: [8]

(1) That is action be abated until the final determination of said San Francisco Superior Court action No. 333,586; but if not,

(2) Dismissing said action, and/or that respondent is under no duty or obligation of any kind toward petitioner, and

(3) For respondent's costs of suit and such other relief as may be proper.

ROBERT E. HATCH,

Attorney for Ernest Tsang,
Respondent. [9]

State of California,
City and County of San Francisco—ss.

Ernest Tsang, being first duly sworn, deposes and says:

That he is the respondent herein; that he has read said answer and knows the contents thereof; the same is true of his own knowledge except as to those matters which are therein stated on informa-

tion and belief, and as to those matters he believes it to be true.

ERNEST TSANG.

Subscribed and sworn to before me this 17th day of May, 1946.

[Seal] ALFRED D. MARTIN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed May 23, 1946. [10]

[Title of District Court and Cause.]

SUPPLEMENT TO ANSWER OF
RESPONDENT ERNEST TSANG

Fifth Defense

On or about October 1, 1943, a limited partnership was organized with one general partner, the said Ernest Tsang, and several limited partners including said Kan and Tsang, and it owned and operated said restaurant business for a period of three years thereafter, all with the express consent of said Kan and all of the other stockholders of The Cathay House, a corporation. By the terms of the articles of said limited partnership it was to exist for a period of three years from said last mentioned date and no longer. Prior hereto, to wit, on September 30, 1946, said partnership expired by its own terms.

Sixth Defense

On or about February 13, 1946, the said Kan instituted [11] an action in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled "John Kan, et al., plaintiffs, vs. Ernest Tsang, et al., defendants," and numbered 349840 therein. In said action said court at the specific request of said Kan ordered and adjudged a dissolution of said partnership and ordered all of the assets thereof to be sold at public sale. In pursuance thereof, to wit, on August 30, 1946, said sale was conducted and all of the right, title and interest of said partnership in and to the said Cathay House, its business, good will, fixtures, furniture and all other assets were sold to the highest bidder. At no time thereafter has said The Cathay House, a corporation, or The Cathay House, a partnership, have any right, title or interest in and to any business or assets of any kind or character, except money on deposit in banks.

ROBERT E. HATCH,

Attorney for Respondent,

Ernest Tsang. [12]

State of California,
City and County of San Francisco—ss.

Ernest Tsang, being first duly sworn, deposes and says:

That he is the respondent named herein; that he has read said supplement to answer of respondent Ernest Tsang and knows the contents thereof; the same is true of his own knowledge except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true.

ERNEST TSANG.

Subscribed and sworn to before me this 1st day of October, 1946.

[Seal] ALFRED D. MARTIN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Oct. 2, 1946. [13]

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 25,864-R

JOHN KAN,

Petitioner,

vs.

ERNEST TSANG, et al.,

Respondent.

Action for reinstatement and compensation pursuant to the provisions of Section 8 of the Selective Training and Service Act of 1940, as amended.

Judgment for petitioner, in accordance with opinion.

Frank J. Hennessy, United States Attorney, and R. J. Scholz and Joseph Karesh, Assistant United States Attorneys, of San Francisco, California, attorneys for petitioner.

Robert E. Hatch of San Francisco, California, attorney for respondent Ernest Tsang.

MEMORANDUM OPINION

Roche, District Judge: This is an action brought under Section 8 of the Selective Training and Service Act of 1940, as amended. The petitioner originally sought employment reinstatement together with compensation for loss of wages and benefits resulting from respondents' alleged refusal to reinstate him, but he now asks only a money judgment for such compensation, waiving other rights [14] that he may have under the Act.

Respondents defend on two grounds: First, that the issues herein have already been decided adversely to petitioner in certain proceedings in the superior court of the State of California, and second, that respondents offered to re-employ the petitioner at the salary he was receiving when he entered the armed forces but that petitioner refused to accept the offer unless it would include a three year contract of employment.

The record discloses that the petitioner Kan was not only one of the founders of the Cathay House, a restaurant in San Francisco, but its active head and the man whose energy and ability were largely

responsible for its phenomenal success. After its founding Tsang bought shares of stock in the business and he and the petitioner became the President and Secretary, respectively, of the corporation. They were co-managers, each receiving the same salary. When Kan received a salary increase, Tsang likewise received an increase. When Kan enlisted in the armed forces on July 23, 1943, he and respondent Tsang were both making \$500 a month. At that time, Tsang, by additional purchases of shares of stock, had gained a controlling interest in Cathay House.

While Petitioner was in the service the corporation was changed to a partnership, Tsang becoming a general partner and petitioner a limited partner, along with others. This change was agreed to by petitioner's wife, who was also employed at Cathay House and to whom petitioner had given power of attorney, but the evidence is conflicting as to whether she and her counsel endeavored to have the change delayed until the petitioner came home on leave. In any event, the change was one of form only. The interested parties remained the same and the restaurant business was conducted as before. Such a reorganization was ineffective to cut off the petitioner's rights under the Selective Service Act.

The petitioner was honorably discharged from the service on November 26, 1943, and shortly thereafter asked respondent Tsang to reemploy him. Tsang was then earning \$750 per month. [15]

From this point on the record contains much conflicting testimony but it does clearly appear that

at no time during the negotiations that followed petitioner's request for reemployment was the petitioner offered the position of co-manager with the same salary as Tsang was then receiving. The most that was offered was his old salary of \$500 a month and there is persuasive evidence that even that offer was conditioned on Kan's signing what the parties denominated a "waiver" or "release." The situation culminated in Tsang's filing an action for declaratory relief in the state court, in which Kan filed an answer and cross-complaint. Judgment was given in favor of Tsang. Kan and three others subsequently filed a suit for an accounting and dissolution of the partnership. The partnership was dissolved and the property sold, Tsang being the purchaser.

Respondents' defense of *res judicata* is based on the foregoing state court proceedings. It is true that the state court made a finding that respondent Tsang and the partnership had offered to restore Kan to the same position which he had held with the Cathay House corporation, but even assuming that such an offer met the Act's requirements, this finding cannot bind a federal court. The same defense of *res judicata*, based on a declaratory judgment rendered by the Ohio state court, was raised by the respondents in the case of *Trailmobile Co. v. Whirls*, 154 F. 2d 866, an action by a veteran for restoration to his seniority status as it existed prior to his entry into military service. The Sixth Circuit Court of Appeals disposed of the defense in the

following language: "The interpretation by the state court of the rights of a citizen under a federal statute is not binding upon the federal courts." The question for decision is thus one of fact—did any offer of reemployment made by respondents to petitioner comply with the terms of the Act.

So far as pertinent, the Act provides that if a position, other than a temporary position, was in the employ of a private employer, the person so employed shall be restored to such a position unless the employer's circumstances have so changed as to make it [16] impossible or unreasonable to do so. It is further provided that such restoration shall be without loss of seniority. The courts have been very liberal in construing these provisions, having in mind the purpose of the statute. They are more than patriotic promises. Rather, they are a guarantee to the honorably discharged veteran that, upon application timely made, he will be restored to his former position or to one of like seniority, status and pay and that he will lose no seniority in the process. If during the veteran's service in the armed forces, the person filling his position receives a higher salary, an offer to reemploy the veteran at his old salary is not a compliance with the Act. The veteran must be given the benefit of any wage increases that have been made during his absence. *Salter v. Becker Roofing Co.*, 65 F. Supp. 633. To the same effect are the decisions of the United States District Court for the Southern District of California in *Parker v. Boyce* and *Covey v. Douglas Aircraft Co.*

In the instant case, when the petitioner enlisted in the army he was co-manager with the respondent Tsang of the Cathay House and received the same salary. Upon his honorable discharge and application for reemployment, he was entitled to be restored to the position of co-manager and to receive the same salary that Tsang, the other co-manager, was receiving. An offer of anything less was not a compliance with the Act's provisions, nor was an offer conditioned on the veteran's waiving or releasing any of his rights guaranteed by the Act. Since the evidence conclusively shows that respondents failed to offer to restore the petitioner to his position as co-manager at the increased salary which respondent Tsang was then being paid, it follows that judgment must be entered in favor of the petitioner.

Petitioner having waived his claim for reinstatement and for all back pay, except for a twelve month period, it is

Ordered that there be entered herein, upon finding of fact and conclusions of law, judgment in favor of the petitioner in the sum of \$7,481.28, that being 12 months back pay at \$750.00 a month less \$1,518.72 earned by him from December 4, 1943, the date of his application for reinstatement, to December 4, 1944, and that respondents shall bear the costs.

Dated: November 13, 1947.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed] Filed Nov. 13, 1947. [18]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial September 10, 11 and 12, 1947, before Honorable Michael J. Roche, United States District Judge, sitting without a jury; the petitioner, John Kan, appearing by his attorneys, Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, Rudolph J. Scholz, Esq., and Joseph Karesh, Esq., Assistant United States Attorneys for the said district; the respondents Ernest Tsang, L. M. Carter, George Chew, Philip Fong and Paul Yuke, by their attorneys, Robert E. Hatch, Esq., and the other respondents, George Chin and Fred Leong, by consent filed in open Court, consenting to a judgment in favor of petitioner, and the evidence [19] having been received and the matter having been orally argued and briefed and fully considered, the Court now makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

I.

This is an action under Section 8 of the Selective Training and Service Act of 1940, as Amended, 50 U.S.C.A. App. 308, and Section 7 of the Service Extension Act of 1941, as Amended, 50 U.S.C.A. App. 357, and the jurisdiction of this Court is based thereon.

II.

Petitioner is a resident of the City and County of San Francisco, State of California.

III.

Respondents at all times herein mentioned were a copartnership consisting of Ernest Tsang, a General Partner, and L. M. Carter, George Chew, George Chin, Philip Fong, Fred Leong and Paul Yuke, together with petitioner and Helen Kan, his wife, as Limited Partners, and maintained a place of business, a restaurant known as the Cathay House, at 718 California Street, San Francisco, California. At the time petitioner left the employment of respondents it was a corporation and was changed to a copartnership while petitioner was in the Army of the United States. Prior to September 28, 1939, Petitioner Kan, in association with an individual, not a party to this action, commenced the business of operating Cathay House. Petitioner Kan interested respondent Tsang in purchasing stock in said corporation. Respondent Tsang became President and Kan became Secretary of said corporation and they were the sole persons actively engaged as managers in the actual operation of the restaurant. [20] The interests of the other stockholders were financial only.

IV.

On or about the 23rd day of July, 1943, at San Francisco, California, petitioner volunteered for service in the armed forces of the United States and was inducted into the Army of the United

States and immediately thereupon entered the said service. Immediately prior to petitioner's entrance into said service he was employed by the aforesaid corporation as a General Manager thereof at a salary of \$500 a month. Immediately prior to petitioner induction into the Army of the United States respondent Ernest Tsang was likewise employed by the aforesaid corporation as a co-manager thereof at a salary of \$500 a month. At one time prior to petitioner's induction into the service, petitioner and respondent Tsang were compensated at the rate of \$200 per month. Thereafter both petitioner and respondent Tsang received simultaneous increases in pay from \$200 to \$300 a month, and from \$300 per month to \$500 per month.

V.

At the time petitioner entered the Army of the United States respondent Tsang was the owner of the majority of the stock in the aforesaid corporation. When the aforesaid corporation was changed to a copartnership respondent Tsang had the majority and controlling interest in the said copartnership and was in charge of the said business. During the time petitioner was in the armed forces respondent Tsang's salary was raised from \$500 per month to \$750 per month.

XI.

Petitioner left his aforesaid position on or about the 23rd day of July, 1943, for the sole purpose of entering the military service of the United States. Shortly before this date petitioner, in preparation

for departure for the armed forces, executed and delivered to his wife, Helen Kan, [21] a power of attorney to act for him in his absence, in connection with said business. At or about the same time, respondent Tsang, as President of the said corporation and the sole remaining active manager, promised and agreed with petitioner and his wife, Helen Kan, that he, respondent Tsang, would diligently protect petitioner's interests in the business. Thereafter Helen Kan assented, on behalf of herself and the petitioner, to the change of Cathay House from a corporation to a copartnership. The change was one of form only. The interested parties remained the same and the restaurant business was conducted as before.

VII.

Petitioner satisfactorily completed his period of service in the Army of the United States on the 26th day of November, 1943, and on that date received an honorable discharge evidencing such satisfactory completion.

VIII.

On or about December 4, 1943 petitioner made timely application to Cathay House, and more particularly to respondent Tsang, for restoration to the position hereinabove described.

IX.

The former position, hereinabove described, left by petitioner on or about the 23rd day of July, 1943, to enter the Army of the United States, was a position other than temporary. At the time of his

application for his former position, and at all times thereafter, petitioner was qualified to perform the duties of said position as set forth under the law.

X.

Petitioner, in making application for reinstatement, stated to the respondent Tsang that he believed he was entitled to the same salary as that which respondent Tsang received, to wit, \$750 a month, but declared that he was willing to work for \$500 per month until the amount of salary would be definitely determined.

XI.

During December, 1943, and January, 1944, petitioner continued to request of respondent Tsang reinstatement to his former position and negotiations were carried on during this period of time. In the latter part of January, 1944, respondent Tsang refused to reinstate petitioner at a salary of \$500 a month without attaching certain conditions to petitioner's reemployment. These conditions were: that petitioner sign a release waiving any rights he might have under the Selective Training and Service Act, approving the change of the Cathay House from a corporation to a copartnership and transferring his stock to his wife, Helen Kan. Petitioner stated he would not sign such a release to be employed at \$500 a month unless he were given a three-year contract. Respondent Tsang stated that under no condition would he employ petitioner for any period of time without petitioner signing the release, as above described, at a salary no more than \$500 per month.

XII.

Respondent Tsang at all time has refused to re-employ petitioner at a salary of \$750 a month.

XIII.

Respondent Tsang determined at the time petitioner made the request for reemployment, that he would under no circumstances rehire said petitioner at any salary and the [23] conditional offer of reemployment that he made was such that he knew the petitioner would not accept it and such conditional offer constituted a subterfuge to prevent petitioner's reemployment.

XIV.

Immediately thereafter, as was his legal right, petitioner sought the assistance of the United States Attorney, who attempted to negotiate a settlement with the respondent Tsang through his counsel, Robert E. Hatch, Esq. These negotiations were continued through April of 1944. Petitioner indicated a willingness, through the United States Attorney, to be reemployed at a salary of \$500 a month, but respondent Tsang, through his said attorney, denied that he had any liability to reinstate petitioner to his former position under the Selective Service Training and Service Act of 1940 and continued in his refusal to reinstate said petitioner.

XV.

Thereafter, and on or about the 20th day of October, 1944, respondent Tsang filed a complaint for declaratory relief against the petitioner in the Superior Court of the City and County of San Fran-

cisco in connection with petitioner's reemployment rights. Petitioner filed an answer and a cross-complaint to protect his interests. The decision of the Superior Court of the City and County of San Francisco is of no moment here, inasmuch as such decision of the State Court is not *res adjudicata* to the issues involved in our case herein.

XVI.

During the war years the profits of the Cathay House increased enormously. It was not unreasonable that [24] the petitioner should have been re-employed at the Cathay House in the position of co-manager at a salary of \$750 a month. The position in said business of like seniority, status and pay to which petitioner is entitled is that of co-manager with respondent Tsang at a salary of \$750 per month.

XVII.

Respondent Tsang in no way has been injured by petitioner's delay in instituting this action, such delay having been occasioned by the proceeding in the State Court instituted, as hereinabove stated, by the respondent Tsang. Respondent Tsang has likewise not been injured by the delay in bringing this case to its conclusion, the greater part of such delay being the result of a stipulation between counsel herein. The remaining respondents likewise have not in any way been injured by the delays hereinabove set forth.

XVIII.

Petitioner was ready, willing and able to work for respondents from December 4, 1943, to December 4, 1944, and continuously thereafter, but as a result of the unlawful action of the Cathay House, and more particularly that of respondent Tsang, petitioner was not reinstated. From December 4, 1943, to December 4, 1944, petitioner earned in another position the sum of \$1518.72. By reason of the respondents' unlawful action, and more particularly that of respondent Tsang, in failing and refusing to reemploy petitioner, either in his former position or in a position of a like seniority, status and pay, he suffered a loss of wages between December 4, 1943, and December 4, 1944, in a sum of \$7,481.28, that is to say, he, the petitioner, suffered a loss of twelve months' pay at \$750 a month, less \$1,518.72.

IX.

Petitioner does not request or desire reinstatement to his former position, but at no time since December 4, 1943, did petitioner abandon his right to reemployment and reinstatement in his former position with the Cathay House, and at all times has diligently pursued his claim for such employment.

CONCLUSIONS OF LAW

The reorganization of the Cathay House from a corporation to a copartnership was ineffective to cut off petitioner's rights under the law.

Respondents, and more particularly respondent Tsang, unlawfully failed and refused from December 4, 1943, to December 4, 1944, and at all times thereafter, herein mentioned, to reemploy petitioner in his former position or in any position of like seniority, status and pay, contrary to Section 8 of the Selective Training and Service Act of 1940, as Amended, (50 U.S.C.A. App. 308), and Section 7 of the Service Extension Act of 1940, as Amended, (50 U.S.C.A. App. 357), and by reason thereof, petitioner suffered loss of wages amounting to \$7,481.28 between December 4, 1943, and December 4, 1944, and is entitled to be compensated by the respondent Ernest Tsang, General Partner, and by the said copartnership, consisting of the said Ernest Tsang, General Partner, and the respondents L. M. Carter, George Chew, George Chin, Philip Fong, Fred Leong and Paul Yuke, Limited Partners, doing business, together with petitioner and Helen Kan, his wife, also Limited Partners, under the name of Cathay House, in the said amount of \$7,481.28. [26]

Let judgment be entered accordingly forthwith, with costs of suit to be paid by respondents hereinabove described.

Dated at San Francisco, California, January 16th, 1948.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Jan. 16, 1948.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 25864-R

JOHN KAN,

Petitioner,

vs.

ERNEST TSANG, et al.,

Respondents.

JUDGMENT

This cause coming on regularly for trial before the Court, sitting without a jury, on September 10, 11 and 12, 1947, Frank J. Hennessy, United States Attorney; Rudolph J. Scholz and Joseph Karesh, Assistant United States Attorneys, representing the petitioner, and Robert E. Hatch, Esq., representing the respondent, Ernest Tsang, the sole General Partner, and also representing the respondents, L. M. Carter, George Chew, Philip Fong and Paul Yuke, and the other respondents Fred Leong and George Chin by consent filed in open Court, consenting to a judgment in favor of petitioner, and the Court having heard the testimony, examined the proofs offered by the respective parties, together with the [28] briefs therein, and the Court being fully advised in the premises and having heretofore filed its findings of fact and conclusions of law and having directed that a judgment be entered in accordance therewith, Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed that petitioner John Kan have judgment against the re-

spondent Ernest Tsang, sole General Partner of a limited copartnership doing business as the Cathay House, and against the copartnership consisting of the said Ernest Tsang, General Partner, and the respondents L. M. Carter, George Chew, George Chin, Philip Fong, Fred Leong and Paul Yuke, Limited Partners, doing business together with petitioner and his wife, Helen Kan, also Limited Partners, under the name and style of Cathay House, for the sum of \$7481.28, together with costs—taxed at \$80.42.

Dated at San Francisco, California, this 16th day of January, 1948.

MICHAEL J. ROCHE,

United States District Judge.

Ent. in Civil Docket 1/17/48, Vol. V—Pg. 415.

[Endorsed]: Filed Jan. 16, 1948. [29]

[Title of District Court and Cause.]

**MOTION FOR NEW TRIAL AND TO MODIFY
AND VACATE FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND JUDG-
MENT**

Respondents hereby move the court for an order granting a new trial and modifying and vacating Findings of Fact, Conclusions of Law and Judgment heretofore entered.

Said motion will be made upon each of the following grounds:

- (1) Irregularity in the proceedings of the court or abuse of discretion by which these moving parties were prevented from having a fair trial;
- (2) Insufficiency of the evidence to justify the judgment and decision, and that the same are against law;
- (3) Error in the law, occurring at the trial and excepted to by these moving parties.

ROBERT E. HATCH,
Attorney for Respondents.

Receipt of Service

The undersigned hereby acknowledges due service of the foregoing, waives any requirements for Points and Authorities or other matters of form and consents to the hearing of said motion on this date.

Dated: January 16, 1948.

FRANK J. HENNESSY,
United States Attorney.

By JOSEPH KARESH,
Assistant United States
Attorney,
Attorney for Petitioner.

[Endorsed]: Filed Jan. 16, 1948. [31]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 16th day of January, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

MINUTE ORDER

Order Settling and Approving Findings of Fact and Conclusions of Law, Judgment, Order Denying Motion for New Trial and to Modify and Vacate Findings of Fact and Conclusions of Law and Judgment

This case came on regularly this day for settlement of findings. After hearing the arguments of Robert Hatch, Esq., for respondent, and Joseph Karesh, Esq., Assistant U. S. Attorney, for petitioner, it is Ordered that the findings of fact and conclusions of law herein be settled and approved and that judgment be filed and entered for the petitioner in the sum of \$7,481.28, with costs. Mr. Hatch filed a motion for new trial and to modify and vacate findings of fact and conclusions of law and judgment. Ordered that said motion be denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Ernest Tsang, one of the respondents above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from that certain judgment heretofore entered herein, to wit on or about Jan. 16, 1948.

ROBERT E. HATCH,
Attorney for Appellant,
Ernest Tsang.

[Endorsed]: Filed Feb. 13, 1948. [33]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL (RULE 75a)

The undersigned designates the following to be contained in the record on appeal:

- (1) Petitioner's Petition.
- (1a) Respondent's Answer.
- (2) Supplement to Answer.
- (3) Opinion of the Court.
- (4) Findings of Fact and Conclusions of Law.
- (5) Judgment.
- (6) Motion for New Trial.
- (7) Minute Order Denying Motion for New Trial.
- (8) Notice of Appeal.

(9) Complete record and all of the proceedings and evidence in the action, as embodied in the Reporter's Transcript.

ROBERT E. HATCH,

Attorney for Appellant.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Mar. 1, 1948. [34]

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 25864-R

ERNEST TSANG, et al.,

Libelants and Appellants,

vs.

JOHN KAN,

Petitioner and Appellee.

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellants herein may have to and including May 3, 1948, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: March 24, 1948.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Mar. 24, 1948. [35]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 35 pages, numbered from 1 to 35, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of John Joseph Kan, Petitioner, vs. Ernest Tsang, a General Partner, et als., Respondents, No. 25864-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$5.60 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 2nd day of April, A.D. 1948.

[Seal]

C. W. CALBREATH,
Clerk,

/s/ M. E. VAN BUREN,
Deputy Clerk. [36]

In the Southern Division of the United States District Court for the Northern District of California

Before: Hon. Michael J. Roche,
Judge.

No. 25864-R

JOHN KAN,

Petitioner,

vs.

ERNEST TSANG, et al.,

Respondents.

REPORTER'S TRANSCRIPT

Appearances:

For Petitioner: Rudolph J. Scholz, Esq., Assistant United States Attorney.

For Respondents Ernest Tsang, Robert E. Hatch, Esq. [40]

Monday, May 27, 1946—2:00 o'clock P.M.

The Court: You indicated heretofore the reason you were segregating these defenses. What was the reason?

Mr. Hatch: The reason is the case was tried at length in the State Court, and between the same parties, and involving the same issues, and it is, in short, that action is determinative, and such being the case, if the court so rules, it obviates the necessity of an extended trial upon the merits; in other words, it saves the time of the court and counsel in going into a trial which I think is unnecessary. May I proceed?

The Court: You may proceed.

Mr. Hatch: This, your Honor, is an action filed by John Kan under the terms of the Selective Service Act, wherein the United States Attorney appears in his behalf as provided by that Act. It was very recently filed. I represent the defendant Ernest Tsang. These gentlemen were, or are, involved in the operation of the Cathay House, which is a Chinese restaurant on California Street, at the corner of Grant Avenue, and have been for a period of time. The complaint in this action charges that in the year 1943 Mr. Kan, the petitioner, was in the Army, I think for a period of about three months, and upon his return from the Service he applied for his position, and asked to be reinstated at the [41] same rate and upon the same conditions as his employment before the war, which was \$500 a month, and that he was refused his re-employment, and that now several years have passed and that under the terms of this Act he is entitled to be heard and to an order of this court ordering him restored.

We have on file an answer in which we deny that he was ever employed by the defendant Ernest Tsang, and that he did not ask for his re-employment after he returned, but to the contrary we offered him his re-employment and he refused it. That is as far as the merits are concerned.

Then, as a special plea in defense, we allege the plea of another action pending, stating that there was a suit maintained in the Superior Court in the City and County of San Francisco, at which time the same issues were litigated, and there was a

judgment there entered that the man had not asked to be re-employed, but, to the contrary, the defendant Tsang had offered to employ him upon the same terms and conditions of his employment before the war, and that he had refused to accept them.

We plead *res adjudicata*, but in view of the fact that at the present time this petitioner, Mr. Kan, is prosecuting an appeal to the Supreme Court of the State of California, I doubt that the plea of *res adjudicata* is the right defense, but rather a plea in abatement. That is to say, there is another action pending. The matter comes on at this time [42] on my application for a separate trial of those affirmative defenses in the theory that if we are correct then it obviates the trial of the case upon the merits. That proceeding has been consented to by the United States Attorney, acting as Mr. Kan's attorney.

Therefore, at this time, I wish to offer in evidence on the separate pleas the various certified copies of the various documents of record in the Superior Court, together with certificate that that action is now pending. I have exhibited these to Mr. Scholz. He is fully familiar with them. I ask they be received.

The Court: Admitted and marked.

(Certified copies of Superior Court records marked Respondents' Exhibit A.)

Mr. Hatch: I have also tendered a stipulation to Mr. Scholz and I believe he should consent to it. It is in substance, 1, that the Superior Court is a court

of general jurisdiction and that Mr. Kan and Mr. Tsang, at the time of the litigation, were both citizens, residents of the City and County of San Francisco, the court had jurisdiction of the parties, and I think the subject-matter, and, further, I offer to prove at this time, either by the testimony of Mr. Karesh, the Deputy United States Attorney, or by stipulation, that prior to the litigation being prosecuted in the Superior Court, Mr. Kan was in consultation with the office of the United [43] States Attorney, and knew at that time that he could, if he chose, prosecute his rights under this Act of Congress in this forum, but elected to proceed in the State Court. I think there is no dispute as to the identity of issues, the only question apparently being raised by the petitioner at this time being indicated in a memorandum which was served upon me this morning, in which they assert that this court was the one that had jurisdiction of the issue, and that the State court did not have jurisdiction. It is my position that both courts had jurisdiction, and that where Mr. Kan, himself, selected the State court to prosecute his rights, that this court should adhere to the ruling of the State court and should not attempt to re-try the case; secondly, that if the determination of the State court is no ultimate determination at law, that is to say, the right to re-employment was one beyond the jurisdiction of that court and should be heard by this court, which I dispute, then that is substantially a determination of the facts between the parties, that this court should not re-examine the facts, but might decide the law

applicable to those facts which have already been determined. In other words, *res adjudicata* has two branches; one, a judgment is a bar to further action; and, secondly, a determination of a court of competent jurisdiction having the parties before it making a determination of the facts, even if not a determination of the law, that that determination of the facts is conclusive. In that [44] respect I have filed a memorandum in this court, and I think there is no dispute as to the legal position.

Then if I might turn to the way this matter comes before the court at this time. Several years ago when Mr. Kan was released from the Army, it was while the war was still in progress, he went out on a medical discharge or some such matter before the war was over. When he returned he did have some discussions with the defendant. At that time they were unable to get together on a satisfactory arrangement between the two, and Mr. Kan then came to the United States Attorney's Office and made a report of his position, and there were two or three meetings with Mr. Karesh and myself, looking to a settlement of the rights. We were unable to reach a fair conclusion as to what should be done, what was right between the two. So the defendant, Mr. Tsang, at my instance, filed an action in the Superior Court in declaratory relief, alleging that Mr. Kan was going around making various claims, but the claims varied to such an extent that he, Mr. Tsang, was unable to determine what they were, or what the rights of Mr. Kan were, if any. We had in mind then, of course, that if we did not start the

ball rolling to get to an issue on it the thing would go along interminably, and if in the long run Mr. Kan were found to be entitled to re-employment, he would be entitled to back pay. We wanted to find that out as soon as possible. Mr. Kan was not taking any initiative to bring this [45] matter into court.

As a matter of fact, we brought a proceeding in the State court to perpetuate his testimony later, and he refused to give his testimony, so then we brought this action in declaratory relief. That was served on Mr. Kan several years ago. But knowing his rights as advised by Mr. Karesh to proceed in the Federal court, Mr. Kan elected to proceed in the State Court.

Now, over there in the State court, one of counsel was Judge Alden Ames. Mr. Kan filed an answer in that declaratory relief, and a cross-complaint, in which he specifically alleged that he was entitled to re-appointment under the terms of the Selective Training and Service Act of 1940, and he had been denied re-employment, so he was asking the court to order his return to work, and for back salary, and numerous other things. In due course that case went to trial. The parties were under no coercion and Mr. Kan, if he had chosen, selected this court, but it went to trial before Judge Frank J. Deasy, and after an extended trial and consideration by the court, the court decided in favor of Mr. Tsang, as will be reflected from the certified copy which I have offered in evidence. Judge Deasy found at no time had Mr. Kan actually offered to or asked for re-employment upon the same terms and conditions as ex-

isted before he went into the service, but to the contrary, instead of \$500 a month he wanted [46] \$750 a month, and instead of his previous employment, which was at the will of the employer, he wanted a three-year contract in writing, guaranteeing they would not discharge him, even if he did not perform any duties, and that those were unreasonable, and they were not the terms that he was entitled to ask for. Of course, he had a right to ask for anything he wanted, including the moon, I guess. but the court specifically found that at no time did he ever ask for or agree, or was not willing and had refused to return at \$500 a month. So the court found as a result he had sustained no damages, he was not entitled to re-employment and, furthermore, that because of certain acts which Mr. Kan did following his return from the service, that he was not a fit and proper employee, that he could not be re-employed without exposing the defendant to irreparable damage. I might say what that was. After he was turned down in his desire for a job at \$750 he brought a loaded gun into the place and, using opprobrious language, threatened to kill my client. Under all those circumstances the decree was formally entered by Judge Deasy and an appeal was prosecuted by Mr. Kan to the Supreme Court, where it is now pending. They have obtained a stipulation extending their time to file a brief. That was the status of this case up to a couple of weeks ago.

Then Mr. Kan returned to the United States Attorney and [47] as a result this action, almost word for word, comparable to Mr. Kan's answer and

cross-complaint in the Superior Court action, again referring to the same Congressional statute, and again asking for the same relief, was interposed in this court. It was for that reason that at this time we feel that there is another action pending, the matter has already been determined, and that this court, first, should exercise its discretion by not retrying this case and, secondly, that whether it is discretionary or not, the proceedings that have been prosecuted in the State court are such that this plaintiff is barred from any relief.

I anticipate the statement of Mr. Scholz as it appears in his memorandum filed this morning. He refers to this statute, wherein it is stated that upon circumstances of this character, I read from the code, United States Code Annotated, "The District Court of the United States for the District in which such private employer maintains a place of business shall have power, upon a filing of a motion or a petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employee to comply with such provisions, and as an incident thereto to compensate such person for any loss of wages or benefit suffered by reason of such employer's unlawful action."

Now, the query is, What is the meaning of that statute [48] where it says, "This court shall have the power?" I believe, if it please the Court, that that is not right. The fact that unless there is special statutory enactment the Federal court, as a court of limited jurisdiction, would have no authority merely

providing, as the rest of the statute says, that if a man returns from a service with an honorable discharge he is entitled to re-employment upon terms and conditions therein specified would not give the Federal court the right to entertain jurisdiction unless there were diversity of citizenship or some prerequisite to jurisdiction, so the Congress has added in that very statute that this court, the district court, should have the power, that is to say, the jurisdiction to entertain such matter. It does not either directly or indirectly negative the fact that the Superior Court has the power, the Superior Court as ultimately differentiated between the Federal court—it is a court of general jurisdiction. The Superior Court, to reiterate, your Honor, has jurisdiction to determine controversies upon all subjects which are not excluded by statute or by law, so there is no doubt but unless you find some place a negating of ~~that~~ authority, some place where the Federal authority says we assume exclusive jurisdiction on this statute—there is no doubt but that the State court is one of competent jurisdiction. They would have to say in this statute, either inferentially or positively, that this jurisdiction lies exclusively with [49] the Federal court, or that the Federal court has excluded the State court from the jurisdiction of this matter.

In summary, my thought is this, that the Superior Court did have jurisdiction to make the very declaration which it did, and that was brought about not by my client but by Mr. Kan, when he came in and pleaded in response to our action for declaratory

relief what his rights were; in other words, he was the one who invoked the jurisdiction of the State court. Regardless of the State court's right, however, to determine the ultimate law under this statute, I contend that the State court has found facts. Those facts admittedly would bar a successful prosecution of this action. In other words, if the Court accepted the findings which have already been made, and I am now differentiating between the findings of fact and the conclusions of law, if this court is inclined to accept the findings of fact made by Judge Deasy then, of course, it would be similar to having a demurrer sustained under the old practice, in that the court did find as a matter of fact, that the petitioner in this case, John Kan, never at any time was willing to or indicated or requested re-employment on the basis that he was employed before the war, but only after he returned to employment in the event that he was given something in addition, that is to say, a 50 per cent wage increase and a contract for the ensuing three years. Under those circumstances I think this court should decline [50] jurisdiction at this time.

Mr. Scholz: Mr. Hatch, I think, has gone rather extensively into what he feels has been proven. We don't know what has been proven in the State court, because we were not there. However, I think it must be admitted for the purpose of this motion that all of the allegations of the complaint are true, and I think the court has to accept that. I questioned Mr. Hatch the last time it was continued if there would be any question of any testimony. Mr. Hatch told

me there would not be. Consequently, we are not prepared to put on any testimony, and we don't think there should be any taken in this case. Therefore, all the statements as to evidence, I believe, should be disregarded.

As to the evidence, I may say this, that the case is reasonably satisfactory. It can be proven and we don't know until there is a trial—that is why we filed the petition here to restore the veteran to his position he had before he entered the armed service of the United States. Some of the defendants who were limited partners admitted the allegations of the complaint. I have a signed statement of that. Mr. Hatch stated that Mr. Kan came to the United States Attorney and was thoroughly advised before he filed this suit in the State Court. I don't think that is strictly true because one of the assistant United States attorneys did handle this before I came here, he referred the matter back, as is customary for our office, [51] to the Attorney General for advice, whether or not they should file the petition. At the time the State action was filed by Mr. Hatch, the declaratory relief action, we had not been advised whether the Attorney General would want us to file this petition or not. When a letter from the Attorney General came back advising us to file a petition the letter was referred to me and I filed the petition about two or three weeks ago. The matter in the State court, of course, was tried some time ago. So, consequently, Mr. Kan could not have been advised that he could file the suit in the United States Court, because it would have to be done

through the United States Attorney, and at that time we were not in a position to advise him it could be done. Incidentally, we had a full, extensive report covering the full matter, compiled by the FBI before we decided to go into it. Whatever Mr. Tsang told Mr. Kan—regarding the matter of res adjudicata, or the equivalent, as far as this is concerned, that there is another action pending, I think Mr. Hatch will agree with me the res adjudicata definitely is out because there is an appeal in the State Court which he shows on his own evidence.

The Court: Why should this court interfere since this matter is pending in the State Court?

Mr. Scholz: In this respect, your Honor. In the first place, it is our position that the action in the State Court is not the same action as here. In the second place, the Federal [52] court has sole, exclusive jurisdiction, and if the Federal court only has jurisdiction, consequently the State court has not jurisdiction. It would not mean anything. I may say this is, I believe, the first case of this kind before your Honor, and, as I said in my Points and Authorities, the act must be very liberally construed to the purpose for which it was intended. After the last war there was a lot of discontent because men who had gone in the Army came back and found while they were working for \$30 a month, men who had stayed at home had profited more or less by it, and there was much discontent. Congress realized that, and in order to ameliorate that condition passed this statute, which provided that when a man joined the armed forces he could come back and

would be restored to his position, the same position he occupied before he left with the armed services, under certain conditions which are very easy to comply with. That was one of the purposes.

The second purpose was for morale. I think I can speak particularly on that because the last five years I was in the Army as a colonel in the infantry, and the question of morale was the highest question; if a man left his wife and family, his job or position, and returned after five or six years and found everything taken from him he would be particularly concerned, and it was for the morale of those who were inducted into the Army that this Act was passed.

The Court: The language in the Act says that this court [53] has exclusive jurisdiction?

Mr. Scholz: No, it does not say exactly that. I will read the Act. (Reads.)

In other words, it says that the district court of the United States shall have the power, it does not state that any court shall have the power but the district court of the United States.

The Court: Well, let's carry that out a little further.

Mr. Scholz: Yes.

The Court: Here is a man who selected the State court in which to defend his legal rights. It is now pending there. Why should this court interfere with it?

Mr. Scholz: The only reason we can suggest is this: First, I may say this, that we don't think that that is the same action in the State court as here.

Nowhere in the complaint or the cross-complaint, or the findings, or anything, or in the entire testimony, and Mr. Kan is here now if your Honor objects to my testimony, he will say there is nothing in that entire action that asks not to be restored to his position.

The Court: Well, dealing with the same subject matter.

Mr. Scholz: I don't think so.

The Court: Unless Mr. Hatch has misled the court, and I don't think he would do that.

Mr. Scholz: I have known Mr. Hatch for many years, and I don't think—I know he wouldn't. [54]

The Court: He said it was the same subject matter.

Mr. Scholz: I know.

The Court: The record discloses that that is the statement he made to the court.

Mr. Scholz: That is his position. I wouldn't mislead this court, either, because it means nothing to me, perhaps, I wouldn't do it otherwise, but it is my opinion that it is not the same action.

The Court: What is your understanding of it?

Mr. Scholz: The action filed in the State court, first for a declaratory relief action, in which he says Mr. Kan claims something which we don't know what he claims, we want him to show what it is before the court. Then to that a cross-complaint was filed. In that cross-complaint they asked for specific and general damages; specific damages for loss of wages under agreement, and general damages for alleged fraud by which Tsang took over control

of the corporation. There is nothing asked that he be restored to the position he occupied before he entered into the army.

The Court: Very well.

Mr. Scholz: Would your Honor like to hear from Mr. Ames?

The Court: Yes.

Mr. Ames: Your Honor, I really am not an attorney of record here; therefore, I am not actually privileged to address the court, but I have been in intimate familiarity [55] with this case from the very beginning. I perhaps could add a little bit of explanation to what Colonel Scholz has said. There is no question, your Honor, and I do not think that anyone here is trying to evade the question that this litigation, both in the State court and here, today, arose out of the same set of facts and due to that there is no doubt but that in the **cross-complaint** which I filed on behalf of Kan, who is the petitioner here, I did not make reference to the statute which Colonel Scholz has quoted, and to that extent the subject-matter is the same.

We come down to a question of definition of what is the subject-matter, and whether or not it is similar. I have this thought to suggest to your Honor: This United States statute, as it is phrased, gives the United States District Court power to command an employer to take back his employee. Now, I know of no such provision in the State law, and I know of no way that we could at any time bring such a proceeding in the State court. To a certain

extent, it is a quasi-criminal proceeding. As far as this United States Court is concerned, all that happened in the State court with respect to the same subject-matter, there is no question about that, is that they had this dispute between them. Mr. Hatch, representing a man named Tsang, who had taken over the entire business, precipitated the matter by filing a suit for declaratory relief, saying that there was a controversy. The complaint is the [56] most general thing you ever read. I did not even bother to demur to it on that ground, because I was more anxious to get the matter into court then on behalf of Kan, who was prior to going into the Army, together with this fellow Tsang, a co-employee of a corporation which was taken while Mr. Kan was in the Army into a partnership. I did file on his behalf a cross-complaint seeking damages. That is all that could be done in the State court, was to seek damages for refusal to take the man back into the business. That was all that was before the State court. That issue, the issue of damages plus also an issue of fraud. We raised the question that when Kan was away in the Army this fellow Tsang grabbed the business with the purpose and intent of defrauding Kan. That is why he had to apply to Tsang when he came back. That issue is also before the State court. Judge Deasy, as Mr. Hatch said, did hold against us on all of those different issues; no doubt about that. There is nothing in the prayer of the cross-complaint to ask that we be taken back into the employ of this business.

because from my point of view I did not believe that that was the kind of thing that the State court had the power to do. This proceeding is definitely just that.

Colonel Scholz's petition is very brief. He says the man was in the Army. He came back and demanded his employment, and his employment was refused. Therefore, the District Court should command his restoration to the position. In that sense there is no similarity between the proceedings. In the other sense, of it being based on the same set of facts, of course, that is true.

(Memoranda of Points and Authorities were then argued by respective counsel.)

The Court: I think, on account of the history of this whole matter, so there cannot be any question about it, you should dispose of the matter in the State court to final judgment and then make the application here, and set it down for trial on the merits on the jurisdiction, as counsel has indicated.

Mr. Ames: Purely as a matter of abatement, your Honor.

The Court: I will abate the matter until any reasonable time. What time?

Mr. Scholz: I think that would be a good idea, too, if agreeable to all concerned, because by that time we should have some decision on the part of the Supreme Court.

The Court: I think since they have taken the matter up in the State court that should be disposed

of. It would be helpful to this court because on the merits of this case if that decision is sustained, why, it would be bound to play a very definite part in the proceedings in this case.

Mr. Hatch: I think any court would be reluctant to find diametrically opposed to another court.

The Court: What time? [58]

Mr. Hatch: I would say December 31st. It is fairly safe a decision won't come out of the Supreme Court——

The Court: Well, I won't encourage—I will cut the time shorter than that if it will bring both sides to a quicker determination.

Mr. Hatch: The Supreme Court has a practice over there of not deciding any case until their pay is about to become delinquent, which is three months after the month in which it is submitted; so if it has not reached the argument stage it will still be a good three months before they decide it.

The Court: Better put it over to the latter part of September.

Mr. Ames: The last day of September?

The Court: Yes.

The Clerk: September 30th.

Mr. Hatch: Could I suggest a Monday?

The Clerk: That is a Monday.

The Court: September 30th.

Mr. Hatch: May I have an order returning to me the exhibits which I offered?

The Court: Yes.

Mr. Hatch: Thank you. [59]

Tuesday, September 30, 1946

Appearances:

For Petitioner: William E. Licking, Esq., Assistant United States Attorney.

For Respondent Ernest Tsang: Robert E. Hatch, Esq. [62]

The Clerk: Kan v. Tsang.

Mr. Licking: If your Honor please, Mr. Hatch, the attorney for the defendants, wrote me a letter and said he was attending the Bar Association meeting and requested that the matter go over one week.

The Court: One week. [63]

Tuesday, October 7, 1946

Appearances:

For Petitioner: Rudolph J. Scholz, Esq., Assistant United States Attorney; Alden Ames, Esq.

For Respondent Ernest Tsang: Robert E. Hatch, Esq. [64]

The Clerk: Kan v. Tsang.

The Court: What is before the Court this morning?

Mr. Scholz: The entire case.

Mr. Hatch: The matter of the pre-trial of the separate defenses was before the Court this morning. I would like to proceed with the trial of this matter within the reasonable future, a week or a month.

The Court: When will you be ready for trial?

Mr. Scholz: Any time—tomorrow?

The Court: Tomorrow morning, then.

Mr. Hatch: Yes, your Honor.

Mr. Ames: What time?

The Court: Ten o'clock tomorrow morning. [65]

Wednesday, October 8, 1946

The Court: Are all the parties of interest represented?

Mr. Hatch: Yes, your Honor. I represent Mr. Tsang.

The Court: Who is before the Court?

Mr. Scholz: If your Honor please, all the parties have been served. I may explain it this way that Kan is, of course, a veteran seeking to be restored to his position. There was a copartnership existing at the time, a limited partnership, consisting of Tsang as a general partner and about seven others as limited partners. They have all been served, but, as Mr. Hatch says, he only appears for the general partner in this case. The other partners have not appeared or have admitted all the allegations.

The Court: That is all I am concerned with.

Mr. Hatch: As I understand, we are proceeding on the affirmative defense as asserted by Mr. Tsang.

This case, your Honor, was filed by Mr. Kan through the United States Attorney seeking to be restored to a position that he had held with a certain corporation. Prior to the filing of this suit and while Mr. Kan was in the service, the business was transferred over to a partnership for purposes of minimizing taxes. It was transferred with the

consent of Mr. Kan. The partnership was organized for a three-year period. Mr. Tsang, who owns the preponderance of the stock in the corporation and who has a majority partnership interest and who was the only general partner in this partnership, interposed an answer [67] setting up various affirmative defenses, most particularly that there was another action pending, to wit, in the State Court, which would serve as a reason why this case should be deferred until that judgment became final.

By consent of counsel, we came before the Court some six months ago upon an arrangement to first try the affirmative defenses, those two affirmative defenses. It was presented here on an afternoon. When we got to the end, I would say a convenient point in the afternoon, the Court indicated it would be in order to continue the case until the 30th of September to see what action, if any, might be reached by the Supreme Court in the State Court proceeding.

The matter came up on the 30th and it was continued until yesterday, and on yesterday it was continued until today. So that, so far as we are concerned, we are here prepared to establish the affirmative defenses.

If the Court rules against us in respect to that, then it would be a matter of setting the case for trial upon the facts or showing.

The advisability of pre-trialing the affirmative defenses is that if the Court concurs with me, then it would be unnecessary to go into the great detail of the plaintiff's case and to try the case on the

merits. And when I say, "try the case on the merits," it is a retrial of the case as it was tried before Judge Deasy in the Superior Court. So that if I may [68] say so, I believe it was unnecessary for the other defendants to be represented at this time as we are interested in the affirmative defenses set up by Mr. Tsang.

It so happens I do represent several of the other partners and am prepared in due course to file formal appearance for them. They were not served. I had some discussion with the marshal about that. It is a little difficult to find some of these people around here.

Judge Ames, who represents Mr. Kan, also represents three other partners, and I presume that he will file an application if he has not yet done so.

Have you filed an application?

Mr. Ames: No, I haven't.

Mr. Hatch: Are your clients not joined as defendants?

Mr. Ames: I believe it is a proper statement in that regard, your Honor, that the two other names, men who were partners, Mr. Leong and Mr. Chin. They were served and do not desire to contest this matter.

Mr. Hatch: I don't know that any default has been taken for any formal appearance on their part. It is really an issue between Mr. Kan and Mr. Tsang.

The Court: I was hopeful that the matter would be disposed of in the State Court.

Mr. Scholz: If your Honor please, this matter came up some time ago, as Mr. Hatch said, in May, I believe, and this [69] matter was argued on the special defenses and at that time my notes showed that your Honor indicated you had jurisdiction of the special defenses, but particularly, another action pending in the State Court had nothing to do with this action.

The Court: I could be mistaken about it. I could change my mind as I have in important cases that they transfer over here. I think the Judges ought to get together on this. I am not altogether sure I have jurisdiction, so if there is any question about it, I will change my mind if you give me any reason.

Mr. Scholz: I think it would be advisable to dispose of that question first.

Mr. Hatch: I don't think there is any question but that the Court has jurisdiction.

The question is, should this Court first abate this action pending the outcome of the State Court case, and when I say abate, that is the State Court practice. Perhaps I should not use the vernacular. It is not an abatement in the sense of a criminal case.

The Court: Since there is a State Court action, couldn't the State Court dispose of this matter?

Mr. Hatch: Yes.

The Court: Well, why hasn't that been done?

Mr. Hatch: They have quite a few other cases in the State Court and we poor lawyers have no way of forcing the [70] judges to act any faster than they want to. As a result, this case has not

yet reached the calendar of the Supreme Court or District Court of Appeal. It is waiting its turn.

The Court: Do you think that will be helpful to us in any way?

Mr. Hatch: It is my position it would be res judicata and would dispose of this matter as a matter of law.

The Court: Is it coming up in the Supreme Court today?

Mr. Hatch: It has not reached the calendar yet.

The Court: Didn't you say there was something pending in the Supreme Court?

Mr. Hatch: This case, raising the same issue, was tried before Judge Deasy and I represented Mr. Tsang. Judge Deasy ruled that there was no obligation inuring to the benefit of Mr. Kan of any kind or character. There was no debt for unpaid salary. There was no debt for damages, for alleged breach of contract, and that Mr. Kan had no right to be restored to his former position, that it had been offered to him and that he had refused to accept it. From that Mr. Kan took an appeal to the Supreme Court of the State of California and that was in turn transferred to the District Court of Appeal and is waiting its turn to be reached. It will be some several months yet, I presume.

The Court: The reason I put you on today is because it is the only date I have for some time. [71]

Mr. Hatch: It would be of definite assistance if your Honor would rule on the sixth and seventh defenses at this time, because, as I have contended, if you rule with me, it will be disposing of this case

and we will not have to come back at a subsequent time.

The Court: We do not know what the Supreme Court may do. If it affirms Judge Deasy's opinion, we are engaged in an idle act here.

Mr. Hatch: I think so, but if we take advantage of the fact that the company has gone out of business, then we won't have to wait until the Supreme Court gets through with the case; and the desirability of that is that the partnership is in dissolution under the jurisdiction of Judge Foley. At the present time they are reserving a large sum of money in the receiver's hands awaiting the disposition of Mr. Kan's claim. If your Honor rules on that subject at this time, that can be reported to Judge Foley and we will eliminate one of the controversial issues now existing in the partnership.

The Court: But if those matters are all pending in the State Courts, I don't think I would be justified in going ahead with the case under the circumstances. I will not transfer the matter while it is pending in the State Courts.

Mr. Hatch: There must be something wrong with our system of jurisprudence when a man can have his day in court and because the ruling is adverse to him, he can walk two blocks to [72] the east and start all over again. That is not right.

The Court: I repeat, it goes to the very merits of this case. It was a question for decision by the Supreme Court, you say, is that right?

Mr. Hatch: I don't recall what you are referring to, your Honor.

The Court: You said this matter is pending in the Supreme Court on Judge Deasy's decision?

Mr. Hatch: Yes.

The Court: What was his decision?

Mr. Hatch: His decision was to the effect that no right exists in favor of Mr. Kan in respect to the partnership, or business, of any kind or character. He has, one, no right to be re-employed; two, he has no right for damages, and three, he has no right to back salary of any kind or character. That was Judge Deasy's decision.

The Court: I am prepared to make an order now. This matter will go off the calendar and will be restored after the Supreme Court disposes of this issue. To my mind, without going into any details and as far as we have discussed the matter, they go to the fundamental things that we are here concerned with, and I take it, if the Supreme Court affirms the decision of Judge Deasy, we won't have any difficulty here.

That is my present state of mind and if I am in error, you will have an opportunity to present it and we will restore the [73] case to the calendar after the matter has been disposed of in the Supreme Court.

Mr. Hatch: I would like to add this, for whatever purpose it may serve, in disposing of the issues between the parties, no matter what the formal issues are, there is no question but that if the case went to trial on the merits, the same testimony and same evidence would be offered precisely as was the case before Judge Deasy, so it would be a retrial no matter how you look at it. [74]

[Title of District Court and Cause.]

Wednesday, September 10, 1947

Appearances:

For Petitioner: Joseph Karesh, Esq., Assistant United States Attorney: Rudolph J. Scholz, Esq., Assistant United States Attorney.

For Respondent Ernest Tsang: Robert E. Hatch, Esq. [1*]

The Clerk: Kan vs. Tsang.

Mr. Hatch: Respondent Tsang is ready.

Mr. Scholz: Ready for the petitioner.

Mr. Karesh: May it please your Honor, I have asked Mr. Scholz, who is handling this case on behalf of the veteran, to allow me to be associated with him, and for a particular reason, which I will now make known to the court.

There has been, as your Honor knows, a good deal said about a prior proceeding held in the State of California between the parties. It has always been the contention of the Government that the proceedings there are not *res adjudicata* as to the issues presented between the parties in this court, and your Honor so held. However, your Honor, it may be, and I say this with all respect to the court, that your Honor feels that since the court of the State of California has decided adversely to the petitioner, perhaps there is some merit in the respondent's contention.

I feel, your Honor, that had there not been offered in evidence in the State proceedings a copy of a

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

communication between Mr. Kan and the United States Attorney's Office, that the result might have been different, even in the State court. I showed that letter to Mr. Hatch as a basis of effecting a compromise; somehow, that letter got into the State proceeding. It is a confidential communication, if your Honor please, between the United States Attorney's office and Mr. Kan; it [2] should never have been received in the State proceeding. And I make the statement, your Honor, that had that letter not been there the result might have been different. So I respectfully ask your Honor, as I know your Honor will, not to take into account any decision or not to be swayed in any way by the decision of the Supreme Court or by the decision of the courts of the State of California. That letter, your Honor, never should have been received in evidence; it had nothing to do with the proceeding in the State court. And that letter that Mr. Kan addressed to our office never should have been received in evidence.

The Court: Is this an argument?

Mr. Karesh: No, it is my statement that the decision in the State court might have been different had that letter not been received in evidence.

The Court: The only way I can determine this case is from the records. So proceed.

Mr. Hatch: The statement of counsel is not evidence, but I do not want to be understood by my silence as agreeing with what counsel has said. I differ with his statement in its entirety.

Mr. Scholz: If your Honor please, I am representing the United States Attorney's Office. This is

a suit of John Kan, a veteran, against Ernest Tsang, a General Partner; L. M. Carter, George Chew, George Chin, Philip Fong, Fred Leong and Paul Yuke, Limited Partners, doing business under the [3] name of Cathay House.

The petition has been served and I have a statement signed by George Chin and Fred Leong, reading:

“We have carefully read the summons served upon us by the United States Attorney and wish to state that the contents of the complaint by John J. Kan are true. We are not desirous of contesting this case.

“GEORGE CHIN,
“FRED LEONG.”

However, Ernest Tsang, the general partner, sued here, has filed an answer through Robert Hatch, as his attorney.

This is a petition under Section 8 of the Selective Training and Service Act of 1940 as amended. The jurisdiction of this court is based solely on that Act, and this court under that Act has the sole power to judge a matter of this kind. Under that Act the United States Attorney is obligated upon the request of any veteran to enforce his rights as to employment, if he left his employment during the war and entered into the armed service of the United States.

Referring now to the petition on file here, and the answer of John Chan through his attorney, Robert Hatch, paragraph 1 of the petition is admitted. That reads as follows:

“This is a petition under Section 8 of the Selective Training and Service Act of 1940 as amended, and the jurisdiction of this court is based on that Act.” [4]

Paragraph 2 of the petition is also admitted, to wit, that, “Petitioner is a resident of the City and County of San Francisco, State of California, residing at 1060 Powell Street thereof.”

Paragraph 3 is denied.

Paragraph 4 is admitted. If I am incorrect in anything, Mr. Hatch, will you interrupt me? That reads:

“That on or about the 23rd day of July, 1943, at San Francisco, California, petitioner was inducted into the military service of the United States, and thereupon entered into said service.”

Mr. Hatch: That is correct. I have only denied paragraphs 3, 5, 8 and 9, your Honor.

Mr. Scholz: All of the paragraphs are admitted and stipulated as admitted except paragraphs 3, 5, 8 and 9, is that correct, Mr. Hatch?

Mr. Hatch: Paragraphs 3, 5, 8, 9, and 10 are denied, your Honor.

Mr. Scholz: Unless you want to make a statement, I will proceed.

Mr. Hatch: Yes, I do. So that the record will be straight in this matter, I wish to call attention to the fact that there have been numerous hearings in the past. The first hearings were during the

time the action in the State court was still pending; I believe Judge Deasy had made his decision; [5] however, the case was up on appeal, and your Honor deferred this action awaiting the decision of the State Supreme Court for whatever enlightenment that might give without committing yourself. It was my argument at that time that the action was abated on the ground that there was another action pending involving the same matter.

At that time, at least on one occasion, if not two occasions, the plaintiff, through the United States Attorney, or by Judge Ames, or Mr. Romer, the attorneys in the State action for Mr. Kan, attempted to differentiate this proceeding from the State Court proceeding. The main argument that was made in that respect was that the State Court action involved the issue of damages and not the restitution of employment; that the GI feature, under the Federal proceeding, his right to restitution to employment was independent of his right to damages, and here was the question of money compensation and determination if Mr. Tsang should re-employ him. They argued at that time, which was shortly before October, 1946, that nonetheless this court should try merely the feature whether the man should be returned to his position, contending that the fact that the State court held that he was not entitled to any compensation by being deprived of his position, did not prevent your Honor from entertaining this feature of the case. Of course, the grievous error that was committed by counsel at that

time was that the articles of partnership of this Cathay House—under [6] the terms of the articles of partnership the company was formed for a period of three years beginning October 1, 1943—so that shortly after this argument was presented to your Honor the partnership terminated. They are asking for him to be restored to his job at \$750 a month. There is no Cathay House partnership in existence. They are asking that the petitioner, himself, be restored to his job in a company that does not exist. When that fact was brought to the attention of counsel, they made the argument, Now, we are in a position, if that is so, to ask for damages for loss of wages. That statement was made by Mr. Karesh at one of the recent sessions in this court.

Now, Mr. Scholz takes over and he says, “We want to go ahead on the complaint and petition.” He does not tell your Honor what relief they are asking; he does not enlighten the court upon the issues. Not only was this partnership terminated by its articles of partnership subscribed to by Mr. Kan and the other partners, but Mr. Kan brought another action in the State court for the dissolution of the partnership. The State court took jurisdiction of that. Dissolution was granted last summer upon stipulation of counsel representing all of the partners and further upon the concerted action of the attorneys for the partners this place of business was put up for sale; and on August 30, 1946, there was a public sale of all of the assets of the partnership. At that time [7] Mr. Kan did bid; he was outbid by Mr. Tsang. There was competitive bidding

that went on for a period of an hour or two, and finally the property was knocked down and sold and a bill of sale of the business was given to Mr. Tsang. Mr. Kan filed no claim against the partnership in the receivership proceedings for his loss of wages or damages. That partnership has been wound up by the action and decree of the State court at the instance of Mr. Kan.

Now, we are still over a year in this court with what we might call a new complaint. They ask for restitution to a position which no longer exists. Now they do not say in the oral statement this morning what they are asking for by way of relief. If they are asking for money their remedy would have been to file a claim in the dissolution proceeding, and it would have been allowed there. Be that as it may, the State court proceeding specifically held that Kan sustained no damages. They have been going from one court to another court, and from one counsel to another counsel. No one makes the same contention. I do not know what I am defending at this time. It seems to me we have never disputed any question of fact.

The case went up on appeal to the State Supreme Court upon briefs, in which I pointed out that there was no conflict of facts. Here we are this morning starting anew, when it seems to me the orderly procedure is to bring the court's attention [8] to the fact that the partnership no longer exists, and I think that counsel should be directed at this time to state what relief it is they claim they are entitled

to. If it is limited to damages, then we have the finding of the State court.

Finally, I might say that it has never been the contention of the defendant and it is not the contention now, that the findings of the State court upon the questions of law, that any finding in that respect was binding upon your Honor. It is my contention that there has been an action between these men by Mr. Kan bringing the issues before the court by his affirmative cross-complaint, and those issues were between two men who were residents of the State of California. They chose that forum to raise the issues of fact. The trial court there determined the facts. Those facts are now binding upon these parties, and the judgment having become final, it is my contention that the judgment in the State court is binding upon the questions of fact, and taking those questions of fact as determined, that there is no question of law involved in this case. In other words, that the court, following the finding of the State Court that Mr. Kan, upon his return from his short sojourn in the Army, was offered his job back on the same basis that he had before the war, and that he undertook to consider it and then terminated it, all within the period of one year after he returned from service, and that at no time during that one-year period did he ever indicate that he was willing to [9] accept or return to his former job upon the same basis he had before; now, if those are the facts then there is no issue of law for this court to determine, because if he was offered that

job back and did not take it, and thereafter refused to take it, then this court could say, "Now, I will order you to go back and take this man to work." That would be so if the partnership were still in existence, but of course it is not in existence.

The Court: You may answer counsel.

Mr. Karesh: If your Honor please, there are two issues involved here. The first issue is the issue of fact, did the Cathay House offer Mr. Kan back his position? Mr. Kan denies it, and says it was offered back to him with certain conditions, conditions which under the law he did not have to meet. In other words, the Selective Training and Service Act, Section 8, says, when a veteran comes back from service he is entitled to his job back with no strings attached, and there were strings attached. Second, let us assume for example, as Mr. Hatch says, for the purpose of argument, that when Mr. Kan came back from the service he was offered his same salary, which was \$500 a month. Now, when he went into the service the other man, Mr. Tsang, who was likewise a manager along with Mr. Kan, was making \$500 a month. When Mr. Kan got out of the service Mr. Tsang was making \$750 a month. Therefore, your Honor, under the Selective Service Act, before it could be said that the Cathay House had offered Mr. Chan his job back, to fulfill the requirements of the Selective Service Act they would have had to have given him \$750 a month, because under the law a man is entitled to all of the increases in pay given while he was in the service. In other

words, your Honor, if I had a job as manager at \$500 a month before I went into the service and another man had a job at \$500 a month, and he did not go into the service, and he was likewise a manager, and when I came out of the service he was making \$1000 a month, I am entitled under the Selective Service Act to \$1000 a month. Otherwise, the requirement of the Act could not have been performed. So there are two issues, one, Was he offered this job back? and second, If he was, was the requirement of the Act fulfilled by offering only \$500 a month, the amount he was given when he went into the service, or should his salary have been likewise raised to \$750 a month, which Mr. Tsang had been raised to? Those are the issues of the case. We are not asking for re-employment. The Act says you are entitled not only to your job back for a year, but you are entitled to loss of wages. We are asking for one year's pay.

The Court: I have some other matters to take up. We will take a short recess.

(Recess.)

Mr. Hatch: Before counsel proceeds with the testimony, as I understand there is no claim for restitution, but his [11] claim is for one year's loss of wages. They do not say against whom. The only defendant before the court is Mr. Tsang. Is it possible that they contend that one of the partners is responsible for the bills of the partnership? Is there any dispute that the partnership is not in existence?

The Court: Answer that.

Mr. Karesh: There is \$100,000 in assets of the Cathay House in the hands of the receiver. We want twelve months at \$750 a month.

Mr. Hatch: From the receiver? I do not represent the receiver.

The Court: The only thing you need to do is to protect the record on both sides. I can see, very frankly, no matter what I may do, that some other court will have to review it. Proceed with that thought in mind. I want you both to have a record.

Mr. Hatch: I ask that the court at this time instruct the counsel for the plaintiff to state what it is that they are asking in the way of relief, and against whom.

The Court: You may state that, Mr. Karesh.

Mr. Karesh: The prayer reads, "Wherefore petitioner prays that the respondents be specifically required to comply with the provisions of the Selective Training and Service Act of 1940, as amended, and with the Service Extension Act of 1941, by reinstating the petitioner to the position of general manager [12] of the Cathay House and to compensate the petitioner for loss of wages and benefits suffered by reason of the respondents' unlawful action." That is 12 months' pay at \$750 a month that Chan is entitled to be recompensed as general manager. However the act additionally states, "In case any private employer fails or refuses to comply with the provisions of sub-section (b) or subsection (c) the District Court of the

United States for the district in which such private employer maintains a place of business shall have power, upon a filing of a motion or a petition, or other appropriate pleading by the person entitled to the benefits of such provisions to specifically require such employer to comply with such provisions and as an incident thereto to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action."

The Court: Is he satisfied with loss of wages?

Mr. Karesh: I would like to ask that question of Mr. Kan: You are satisfied if the Court will order your wages paid, you do not particularly care to work for the Cathay House?

Mr. Kan: I am satisfied.

Mr. Hatch: That is not an answer.

Mr. Karesh: We allege he is entitled to one year's wages, and whether he gets the job back, or not, we do not care.

The Court: Proceed.

Mr. Hatch: Now, I want to know who they are claiming this [13] loss of wages from. If he has closed his opening statement I now move for judgment in favor of the defendant Ernest Tsang upon the basis of the plaintiff's opening statement; accepting what they say to be true, although controverted by the defense, that they make out no case for this court to entertain, and in that respect I point out that the receiver of the partnership is not before the court. The court cannot order Mr. Kan to pay any money out of the partnership. If the

court should make an order against Mr. Tsang, Mr. Tsang would have no way of getting money out of the partnership. Now, if the relief is against the partnership, the only way that the court would get jurisdiction to require the payment would be to have the receiver before the court. I did not represent the receiver in respect to that proceeding in the receivership, and I therefor make that motion. If they are asking relief, if they want it from the partnership, then I move that the court continue this case until the receiver comes before the court. I have this to say to the court, it is not evidence, but during the past several weeks we have had numerous hearings before Judge Foley. I filed in that action a claim by Mr. Tsang against the receiver, and stated it to be a contingent claim, that if Mr. Tsang should be subject to a judgment in this case it would be because of his capacity with the partnership, and that that liability would be a liability of the partnership, not of Mr. Tsang individually. Of course, Mr. Tsang, as an individual, [14] never did employ Mr. Kan; and Judge Foley has ruled, although the order has not been entered, that that claim be disallowed. That places the matter where we are in a very unfortunate position. This proceeding is apparently against Mr. Tsang, individually, because I represent him individually only. They are proceeding upon the theory, according to Mr. Karesh, that there is \$100,000 in the receivership. I cannot get any part of the money out, and the only fair and sensible procedure would be that

if this action is against the receivership or the partnership, then that entity should be brought before the court. I have no power over that. I have done everything I could to protect Mr. Tsang in the event of a contingent liability, but the court over there has ruled that so far as he is concerned this is not a partnership or receivership matter, inasmuch as neither the partnership nor the receiver has been made a party to this action.

Now, I respectfully submit to your Honor I should not be put in the position of representing somebody I do not represent, and to include Mr. Tsang is exposing him to a liability on the theory that he is going to get it out of the receiver. I might say that when I presented this contingent claim to Judge Foley, Judge Ames, as one of the attorneys for Mr. Kan, opposed the allowance of that claim and said that the claim should be rejected. Now, Judge Ames does not appear here, and Mr. Romer, who is the other attorney for Mr. Kan, was not [15] present in the proceeding in the State court. You can see what I am up against, because every time I get another court counsel has a different contention. I am not wanting to waste the time of this court. It is perfectly obvious to me and I think it should be to everybody else, that we are not in a position to proceed today against the partnership, and up to this point counsel won't say who they are trying to collect this judgment from if they get it.

Mr. Scholz: Your Honor, the complaint specifically states what we are asking for. Ernest Tsang

is a General Partner, and the other partners are either fictitious or just on the surface limited partners. The limited partners were all served and they appeared and they do not want to contest this case, and they say the contents of the petition are true. A general partner has full control. A limited partner, as your Honor knows, is one who has a limited amount of assets; he has no control, absolutely no control of the business. He cannot tell what it shall do in any way. If it does, he becomes a general partner.

The Court: Counsel may proceed with the trial.

Mr. Hatch: It is understood by everybody that I do not represent the receiver, that I represent Ernest Tsang individually and not otherwise.

The Court: Proceed: You may renew your motion later.

Mr. Scholz: At this time I will offer a copy of a letter [16] signed by George Chin and Fred Leong.

Mr. Hatch: It is really not a matter of evidence, but I have no objection to it.

The Court: For the purpose of the record, what is it you are offering?

Mr. Scholz: It is merely a statement attached to a copy of the summons and complaint and states, "We have carefully read the summons served upon us by the United States Attorney and wish to state that the contents of the complaint by John J. Kan are true. We are not desirous of contesting this case." Signed, George Chin, Fred Leong. May 8, 1946.

The Court: It may be admitted and marked.

(The document was marked Plaintiff's Exhibit 1 in evidence.)

Mr. Scholz: I also have here a return on service of writ on George Chin and Fred Leong by the United States Marshal. May that be admitted and marked?

The Court: It may be admitted and marked.

(The return on service of writ was marked Plaintiff's Exhibit 2.)

JOHN J. KAN

called as a witness in behalf of petitioner; sworn.

The Clerk: Will you state your name to the court?

A. My name is John J. Kan.

Q. (By Mr. Scholz): You are the petitioner in this case? [17]

A. I am.

Q. You reside at 1060 Powell Street, San Francisco, California?

A. I do.

Q. At the time you filed this action, which was April 18, 1946, there was a partnership doing business under the name of Cathay House?

A. That is right.

Q. Do you know who the general partner was in that partnership?

A. The general partner was Ernest Tsang.

Q. There were also some limited partners?

A. That is right.

Q. The limited partners were L. M. Carter, George Chew, George Chin, Philip Fong, Fred

(Testimony of John J. Kan.)

A. That is what I understood. I have never seen the limited partnership papers.

Q. You have never seen either the original or a copy of the limited partnership papers?

A. No.

Q. This change took place, you said, while you were in the Army of the United States? [20]

A. Yes.

Q. Now, immediately prior to your entrance into the military service of the United States, you stated you were employed as general manager of the Cathay House, the corporation?

A. That is correct.

Q. What was your salary at that time?

A. My salary was \$500 per month.

Q. When you left this position as general manager at the salary of \$500 a month you left for the purpose of entering into the military service of the United States? A. I did.

Q. Did you satisfactorily complete your period of service in the armed service of the United States on the 25th of November, 1943?

A. I did, and I received an honorable discharge.

Mr. Scholz: We will offer in evidence, if your Honor please, a photostat of the honorable discharge of John J. Kan.

Mr. Hatch: We object to it as merely incumbering the record and being immaterial, irrelevant and incompetent. We do not dispute it. I think we are going to have a very voluminous record without any

(Testimony of John J. Kan.)

additional documents. It is only going to incumber the record. There is no denial in the pleading.

Mr. Scholz: That is correct, there is not.

The Court: Very well, proceed.

Q. (By Mr. Scholz): Now, you were discharged on the 25th of [21] November, 1943 and within 90 days after your relief from such armed service you made application to Ernest Tsang for restoration to the position that you had with the Cathay House prior to entry into the service of the United States?

Mr. Hatch: Before you answer that—To which I object on the ground that calls for an opinion and conclusion of the witness.

The Court: He can answer "Yes" or "No."

Mr. Hatch: Additionally, I object to it as being immaterial, for the reason that there is no foundation shown that Ernest Tsang, the only defendant in this case, was directed to—the question is not directed, and it would not elicit the fact that the job was asked of Ernest Tsang individually.

The Court: I will sustain the objection.

Mr. Scholz: I will clear the matter up.

Q. Within 90 days after you were released from the armed service you made application for restoration to the position you had occupied just prior to your entrance into the service of the United States?

A. I did.

Q. Whom did you make that application to?

A. I made that to Ernest Tsang.

(Testimony of John J. Kan.)

Q. And at that time what position did Ernest Tsang occupy with reference to the corporation, or the partnership?

Mr. Hatch: To that question I object on the ground it is [22] not within the issues of this case.

Mr. Scholz: There is testimony before the court that Tsang was the president and a general partner, and the only one who had any control of the general partnership was Ernest Tsang. The point is, under the Selective Service Act the veteran may make application within 90 days after his release. Now, we are proving by this witness that he did within 90 days make application to Ernest Tsang—

The Court: What was his position at that time, do you know?

Mr. Scholz: At that time—You may answer.

A. Mr. Tsang, as I understood, was the general partner of the Cathay House at that time.

Q. (By The Court): You understood. What are the facts? Do you know anything about it?

A. I was informed by my wife.

Mr. Scholz: You cannot testify to that. Do I understand that the court has ruled it is within the issues?

The Court: It may or may not become an issue. I will allow it subject to a motion to strike and over your objection.

Mr. Hatch: I will state to the court that Mr. Tsang was the sole general partner of the partnership during the life of that partnership; he was president of the corporation at the time that Mr. Kan

(Testimony of John J. Kan.)

was there before he left for service, and [23] continuously ever since, including the present time, and the basis of my objection is that we have only Mr. Tsang as an individual as a defendant in this case; if the partnership or the corporation were a party to this proceeding and I represented them I would not make the objection, but I have already tried to emphasize to the court I did not represent those entities. It therefore becomes a false issue, presenting to your Honor a responsibility of an employer who is not before the court, but should be before the court if they seek redress against him.

Mr. Scholz: Mr. Ernest Tsang was sued as a general partner. He is the only one who had any control over that partnership, and he certainly is before the court.

Mr. Hatch: What became of the receiver?

The Court: What is there before the court now?

Mr. Hatch: My objection to the question as to what capacity Mr. Tsang held at the time that this gentleman is talking about.

The Court: I will allow it subject to your motion to strike and over your objection.

Mr. Hatch: I now move to strike that evidence.

The Court: The motion will be denied at this time. We will take a recess.

(Recess)

Mr. Hatch: If your Honor please, I would now like to call [24] to your Honor's attention the fact of the receivership of which there was no formal

(Testimony of John J. Kan.)

proof. I would like to have the privilege accorded at this time to offer in evidence a record in the receivership proceedings. I do not have certified copies, but I will either have them or satisfy Mr. Scholz of the authenticity of my copies. Commencing with the complaint for dissolution in the Superior Court, No. 349,840, which suit was filed by Mr. Chan and two men in the Superior Court, together with the decree of distribution that was entered in that case, together with the order appointing a receiver, the order for the sale of the business, and the decree of dissolution, signed and filed in the court, and also a certificate that the receivership is still in force and effect; that the partnership is still under a receiver.

Mr. Scholz: If your Honor please, we will make the objection on the ground that it is not proper evidence, that it is not relevant or competent or material, because this action, as I view it, is directly against an individual. We are not concerned with anything else. This action is against an individual, and there have been case decided by other district courts that have held along that line. At the proper time we will file such authorities.

Mr. Hatch: I will call your Honor's attention to the fact that the petition in this case alleges that Kan was employed by the corporation and not by the partnership, the successor [25] in interest of the corporation. Nowhere in the pleadings is there any claim that Kan was ever employed by Mr. Tsang, an individual, or that Mr. Tsang was ever the successor

(Testimony of John J. Kan.)

of the employer. It would seem to me that we are still before the court with no pleading against any employer.

Mr. Scholz: I do not think that is quite a correct statement.

Mr. Hatch: There is no pleading here—let us say they have a claim against the partnership; that would be a matter for the receivership. There is no assertion in any pleading that Mr. Tsang is a successor in interest.

Mr. Scholz: Mr. Hatch will have an opportunity later. I suggest that we get through with this witness.

The Court: Proceed.

Q. (By Mr. Scholz): Mr. Kan, what was the Cathay House, what sort of business was that?

Mr. Hatch: We will stipulate it was a restaurant at the corner of California and Grant Avenue, and that has been its only activity at any time.

Mr. Karesh: It has a liquor license and a bar?

Mr. Hatch: It has a liquor license, but no bar. It has a service bar.

Mr. Scholz: Now, how did this Cathay House, the restaurant, come into existence?

A. Well, it goes back quite a ways. Dr. Theodore Lee approached me—— [26]

Mr. Hatch: I will object to this as immaterial.

Mr. Scholz: It is just preliminary.

Mr. Hatch: As a matter of information to the court, I will state Mr. Kan and Dr. Theodore Lee

(Testimony of John J. Kan.)

formed this restaurant, formed the restaurant, and that Ernest Tsang came in briefly after its origin; that stock was issued to Tsang. Dr. Lee sold out and Mr. Tsang put additional money in, bought additional stock, and by the time that Mr. Kan went into the service that Mr. Tsang was the majority stockholder.

Mr. Scholz: And will you stipulate that Kan held a comparative position to that of Mr. Tsang?

Mr. Hatch: There is no doubt that Mr. Kan held a comparative position.

Mr. Karesh: Is that stipulated?

Mr. Hatch: Yes.

Mr. Scholz: Is it also stipulated that the position held by Mr. Kan was not a temporary position and was not just only for a short period of time?

Mr. Hatch: That is right. In other words, he was on a temporary unrestricted basis and had been there since the inception.

Mr. Scholz: You say temporary?

Mr. Hatch: He was employed by the corporation since its inception, but of course he had no contract. The corporation had a legal right to discharge him at any time, as it could discharge any other employee.

Mr. Scholz: That is correct. The only point I had was [27] that it was not merely for a day or two.

Mr. Hatch: He had held the job for a period of years.

Mr. Karesh: You mean as a regular employee.

Mr. Hatch: As a regular employee.

Mr. Karesh: Is that stipulated?

Mr. Hatch: Yes.

(Testimony of John J. Kan.)

Mr. Karesh: Since the inception of the Cathay House in 1939?

Mr. Hatch: Correct.

Mr. Scholz: Up to the time he left for the service?

Mr. Hatch: Yes.

Mr. Scholz: That eliminates all that.

Q. What were your duties with the Cathay House?

A. My duties as general manager were to take care of buying or purchasing all supplies, setting up the system of operations, taking care of the advertising, making up the menus, making any change that had anything to do with the operation of the restaurant.

Q. What were Mr. Tsang's duties at that time?

A. Mr. Tsang's duties were mostly taking care of the cash, the banking, and purchasing of liquor. Occasionally he helped on the floor in the business.

Q. For the purpose of the record, that was started by you and Dr Lee about October, 1939?

A. It was started around July, 1939, but the actual opening of [28] Cathay House was October 7, 1939.

Mr. Scholz: The corporation was incorporated on September 28, 1939, is that stipulated?

Mr. Hatch: Yes.

Q. (By Mr. Scholz): The Cathay House was very successful, was it not?

A. It was.

(Testimony of John J. Kan.)

Q. And it made over \$200,000?

A. I think in excess of \$200,000.

Q. By that I do not mean gross profit. Was that net or gross?

A. That is net profit.

Q. They have now assets of \$100,000 or more?

A. It had assets of over \$200,000 in cash alone in August, 1946.

Q. Now, what was Tsang's official position at the time you left for the service, United States Service, by that I mean outside of president, was he, if I may lead you, was he a co-manager?

A. Yes, he was.

Q. With you? A. Yes.

Mr. Hatch: I have no objection to it except it clutters up the record.

Mr. Scholz: Is it stipulated that John Kan and Ernest Tsang were co-general managers at the time he left for the service in the United States Army?

Mr. Hatch: That he acted as such without any title. [29]

Mr. Karesh: The stationery shows a title.

Mr. Hatch: The letterhead shows the name of two individuals without any title. I don't know that any official titles were ever granted by the corporation.

Mr. Scholz: I am going to offer this in evidence as soon as I lay the foundation.

Q. Mr. Kan, I hand you herewith a business card and also a letterhead on which is written "Cathay House," and on the letterhead is "John J. Kan and

(Testimony of John J. Kan.)

Ernest Tsang," and on the card is "John J. Kan, General Manager," and ask you if Mr. Tsang was familiar with this stationery.

A. Yes, Mr. Tsang was familiar with the stationery; he also used the same stationery, and at the time these cards were printed there were some printed for Mr. Tsang, so that the stationery would all be uniform.

Q. In other words, then, as I understand the letterhead was used by Mr. Tsang and yourself, and the card was used by Mr. Tsang and by yourself and instead of where "John J. Kan, General Manager" is written Mr. Tsang had his name there?

A. That is correct.

Mr. Scholz: I offer this in evidence.

The Court: It may be admitted and marked.

(The card and letterhead were marked Plaintiff's Exhibit 4 in evidence.)

Q. (By Mr. Scholz): Now, at the time or just prior to your [30] induction into the military service of the United States what was Mr. Tsang's salary?

A. At the time I was inducted into the Army Mr. Tsang's salary was \$500 a month; it was the same as mine.

Q. Now, upon your return from the Army and within 90 days after you were discharged from the Army, you have already stated that you asked Mr. Tsang for a return of your position. What was Mr. Tsang's salary at that time?

A. Mr. Tsang's salary at the time I first saw him after my return, after my discharge there——

(Testimony of John J. Kan.)

The Court: Fix the time as near as you can.

Mr. Scholz: Fix the time.

A. That was December 4, 1943; that was my first day in town after I was discharged. His salary at that time, as I understand, was \$750 a month.

Mr. Hatch: From the partnership, we so stipulate.

Mr. Scholz: So stipulated.

Q. Now, did Mr. Tsang refuse or decline to re-employ you and restore you to the position which you had prior to your entrance into the military service of the United States? If that is not clear, I will reframe it. You have already testified that you saw Mr. Tsang about being re-employed, did you not? A. That is right.

Q. And you have already testified that that was about December 4, 1943? [31] A. 1943.

Q. At that time did you ask Mr. Tsang to be restored to the position that you formerly occupied before your entrance into the military service?

A. Yes, I did.

Q. Did he refuse to re-employ you upon the same terms and conditions?

A. Not on that day, no.

Q. What happened on that day?

A. When I first arrived in town I reported to my draft board and then I went to see Mr. Tsang at the Cathay House, and I told him I was discharged and I wanted to come back to work at the Cathay House, and Mr. Tsang told me it was now a

(Testimony of John J. Kan.)

limited partnership and under those conditions I could not be re-employed. However, he made an appointment for luncheon, to discuss that matter, and we did have a meeting, I believe, on December 15, 1943, and discussed my coming back to work.

Q. Now, what happened at that December 15, 1943 meeting with Mr. Tsang?

A. As I recall we had lunch at the Fishermen's Grotto at Fisherman's Wharf, with Mr. Tsang.

Q. Was there anybody else present besides you two?

A. No, there was no one besides Mr. Tsang and myself. I asked Mr. Tsang at that time why he had not informed me of the change-over from the corporation to a limited partnership, and [32] why he *had written* me, because he had told me before I left if there were any major changes made in the operation of the company he would so inform me. Mr. Tsang said, well, he was not very good at writing, and he was quite sure I would have approved of the change-over. And I told Mr. Tsang I did not care particularly if he was the general partner and operated the business as such provided I would receive my old position back. I told him I knew that he was employed by the partnership under a contract of \$750 a month, and I would be quite willing to go back to work at \$750 a month, receiving the same salary as he, because we had an oral agreement that our salaries would always be equal. Mr. Tsang said then that he personally was in favor of my receiving the

(Testimony of John J. Kan.)

same salary as himself, which was \$750 a month, but he wanted to discuss it with his business partner, Mr. George Chew when Mr. Chew would return from out of town. On about December 18 I again went to the Cathay House and saw Mr. Tsang, and asked him whether he had seen Mr. Chew, and Mr. Tsang said that he was not able to get in touch with him. I again told him that I was quite anxious to come back to work at the Cathay House. Mr. Tsang seemed very irritated about my presence and refused to discuss the matter any further. This went on for a time. I went back again to the Cathay House three or four times after that, and tried to get Mr. Tsang to talk about my return, but each time he would procrastinate, and said he wanted more time to think things over, [33] and finally Mr. Tsang told me on one of those occasions to go out and look for a job somewhere else, to which I responded I was one of the founders of the company and I did not see any reason why I should go out and look for a job somewhere else, because I was already a partner in the restaurant.

Then around January 18 I believe I went back to see Mr. Tsang again, and I told him our funds were getting very low, that we had spent most of our savings when I was in service, and my wife was not making very much, and I said I would like to get some guarantee about my return to my position. Mr. Tsang then refused to show me his contract of employment with the partnership; he said he did not

(Testimony of John J. Kan.)

know where it was; he said he did not know where the limited partnership papers were.

Finally, we agreed that we would meet in Mr. Hatch's office, because Mr. Tsang said, "Now, even if I take you back, are you willing to go down to my attorney's office to see what he has to say about it?" So we did arrange a meeting on January 20th to be held at Mr. Hatch's office.

Q. January 20th?

A. Yes, 1944. Present at that meeting were Mr. George Chew, Mr. Tsang, Mr. Hatch, and myself. Mr. Hatch did most of the talking that day. He explained to me that prior to my entry in the Army I was co-manager with Mr. Tsang in the Cathay House, and now it was a limited partnership, and he said, "I advised Mr. Tsang not to re-employ you, because a limited partner cannot [34] be active. Of course, you also know Mr. Tsang is in the driver's seat, but in order for you to go back to your position there are certain papers you must sign to get your job back." Those conditions were first to sign over all my stock to my wife; second, I was to sign a release to all claims of every nature, and, third, I was to sign a contract of employment. I did not quite get it clear. After that discussion I told Mr. Hatch if I have to sign any kind of papers to get my job back I certainly would like to have my attorney present, so we could all agree upon what was to go into the contract and the release. So another meeting was arranged whereby my attorney, Mr. Romer, could be present, and that was to be

(Testimony of John J. Kan.)

held on January 24, 1944. The same people were present, except with the addition of Mr. Romer. At that time Mr. Hatch denied that there was any discussion of any contract of employment, which I was led to believe I was to have because of the fact that I felt that if there was——

Q. Just what he said.

A. Mr. Hatch and I had never discussed the contract of employment before Mr. Romer. I did not think it was much protection for me to go back to work.

Q. Did Mr. Hatch say anything else that he wanted you to sign over at that time, anything about a release of any kind?

A. Well, on January 20th he wanted me to sign——

Q. I am talking about January 24th. [35]

A. He did discuss a release at that time, on January 24th, but being that I felt there was no protection for me whatsoever if I signed over all my stock and signed a release and signed away all my rights, which I had under Selective Service, I wanted a contract of employment such as Mr. Tsang had. So finally Mr. Romer suggested why didn't I go back to work without signing any papers of any sort, "Why don't you go back to work?" And then finally Mr. Romer suggested that Mr. Tsang and I had known each other all these years, "Why don't you get together and discuss it without the presence of attorneys?" And that was the crux of that meeting, and it was finally decided that Mr. Tsang and I would discuss it ourselves.

(Testimony of John J. Kan.)

Q. At any of these meetings up to and including January 24, was \$750 offered you at any time?

A. No.

Q. Now, you said that meeting terminated on January 24 that you and Tsang were to get together on another meeting. A. That is correct.

Q. Did you do so?

A. Yes, I did go back to see Mr. Tsang.

Q. How long after January 24, 1944 was that meeting?

A. I don't remember the exact date, but I think it was about a week after that I went to the Cathay House to see Mr. Tsang.

Q. Was there anybody else there besides you and Mr. Tsang that day? [36]

A. No, just Mr. Tsang and myself, and he seemed to be agreeable to my coming back to work, and also that he would give me a contract of employment such as he had. However, he said, "I do not think this can be final until I think about it further," so a few days later when I did go back I asked for my job at \$500 a month again.

Q. Just a minute. At that meeting shortly after January 24th you say that Mr. Tsang was apparently in a friendly mood and agreed to give you a contract of employment? A. Yes.

Q. Was there any condition attached to that? Did he state that you would have to do any particular thing?

A. No, there was not. It was a very short meeting.

(Testimony of John J. Kan.)

Q. Was anything finally decided?

A. I was led to believe at that meeting that I was ready to go back to work.

Mr. Hatch: Is that the meeting of January 24?

Mr. Scholz: No, it was shortly after that.

The Court: The week following the 24th, approximately?

Mr. Scholz: That was the week following?

A. About a week following January 24, and I thought that I was ready to go back to work. Then a few days later when I did go back to see Mr. Tsang he was very arrogant and said he did not want to talk about the matter, and just walked away, and I walked out; he didn't want me to come up to the Cathay [37] House and be there any more.

Q. What did he say and do at that meeting?

A. I told him at that time that I was ready to go back to work—I said, “Now, we are going to get together on this, I am willing to go back at \$500 a month.” And he said, “Well, I thought one time things would work out but it won't work out now,” and he just walked away.

Q. He refused to discuss it?

A. He refused to discuss it.

Q. Did that terminate your endeavor to have Tsang re-employ you? A. It did.

Q. As far as you were concerned?

A. That is right.

Q. What did you do next about re-employment? Did you go to the Selective Service or any place else?

(Testimony of John J. Kan.)

A. I conferred with Mr. Romer and told him what had transpired in my discussion with Mr. Tsang, and finally we did make application to the Selective Service to hear the case. The draft board, I believe, received a letter from me with all of the details.

Mr. Karesh: About when?

A. I believe that was—I have the letter right here, a copy of the letter, if you wish to see it.

Q. That was shortly thereafter?

A. It was about a month or two later. I understand that the [38] draft board was unable to make a decision on it, and they sent it to Sacramento, and it laid up there for almost a year, and no action was taken.

Q. (By Mr. Scholz): Then the United States Attorney's Office contacted you?

A. I finally contacted Mr. Karesh and told Mr. Karesh about the case.

Q. Going back to Mr. Tsang, of the assets still remaining in this limited partnership, approximately what does he own of that?

Mr. Hatch: I will suggest a stipulation in that regard. It is a fact and I know it to be a fact that the partnership has persisted in the same form, amounts of interest, since the time of the filing of the suit, and these are shown in the articles of partnership.

The Court: What percentage does he have?

Mr. Hatch: In the corporation the total capitalization was 9700 shares of capital stock as of the

(Testimony of John J. Kan.)

time Kan went into the service. The stockholders and the amount of stock held at that time is as follows: Ernest Tsang, 5300 shares; L. M. Carter, 100 shares; Paul Yuke, 100 shares; George Chew, 1500 shares; John J. Kan, 1000 shares; Helen Chan, his wife, 100 shares; Philip Fong, 1000 shares; Fred Leong, 400 shares; George Chin, 200 shares, a total of 9700 shares.

When the partnership was formed it was formed upon the same basis of association as to the limited partners, and there [39] have been some minor changes, some sales or exchanges of interest, and the interest of Mr. Tsang has remained and now is 5300 out of 9700, and Mr. Kan and his wife's interest remains the same at 1100 shares out of 9700. These proportions were determined according to the amount of money each one contributed. After the taking over of the capital stock of the corporation George Chew's stock belonged to Frank B. Wong, it did not belong to Mr. Tsang; he had no control over that stock whatsoever. He had no control over the Frank B. Wong stock.

Mr. Karesh: How about the other stock? How about Mr. L. M. Carter's stock?

Mr. Hatch: L. M. Carter is a Government employee, and Luke, and whether or not they and one or two of the other minor shareholders are dummies, let us say, for Mr. Tsang makes little difference, because in his own name Mr. Tsang owns a preponderance of the stock. Now, Fred Leong and

(Testimony of John J. Kan.)

George Chin are friends of Mr. Kan; I do not know whether he controls them, or not; I think it is immaterial. I know that they joined with him in the dissolution proceedings.

Mr. Karesh: Isn't it true that Mr. Tsang has bought the business—they bought it for about \$25,100?

Mr. Hatch: Yes, I think Mr. Kan's bid was 24,900 and he refused to go any higher, and Mr. Tsang bought it.

The Witness: You did the bidding against me.

Mr. Hatch: Yes, I was acting as Mr. Tsang's representative. [40]

The Witness: You had the lease, and that is why I did not bid higher.

Mr. Hatch: I was acting as the attorney and representative of Mr. Tsang in the bidding, and our bid was \$25,100 for the assets of the Cathay House, save the money in bank or accounts receivable. Judge Ames, on the other hand, started the bidding for Mr. Kan and later Mr. Kan took on and made his own bid. Each party put in probably two dozen bids, jumping up one hundred or two hundred at a time.

Mr. Karesh: That is stipulated?

Mr. Hatch: That is stipulated.

The Court: We will take a recess until two o'clock.

(A recess was thereupon taken until two o'clock p.m.) [41]

Afternoon Session

September 10, 1947, 2:00 P.M.

The Court: You may proceed, gentlemen.

Mr. Hatch: Concerning the stipulation that I was making in response to the question asked by counsel, which was interrupted by the noon recess, since the date of the sale on August 30th of last year, when Mr. Tsang was the successful bidder, the business has been run as a partnership between Mr. Tsang, Frank Bing Wong, and Philip Fong.

Also that in relation to the dissolution proceedings in which the sale was made, Mr. Kan and his wife have the same interest as they had in the partnership, namely, 1100 out of 9700. So when they talk about the amount of money that is over there in the dissolution proceeding to be divided up, he is getting his share. I trust that the comment of counsel this morning as to this fund to be divided up is not suggested to your Honor in the view that it would influence your Honor in the decision of this case upon the merits. Mr. Kan has participated in the benefits of the building up of the partnership business just the same as all of the other partners.

Mr. Karesh: You mean up to the time of dissolution. He did not participate in the new business?

Mr. Hatch: He has no interest in the business since the sale on August 30th of the physical assets, consisting of the stock in trade, furniture, etc. [42]

Mr. Karesh: And the lease?

Mr. Hatch: Not the lease.

Mr. Karesh: The liquor license?

Mr. Hatch: The liquor license.

Mr. Karesh: Isn't it true that Frank B. Wong owns the property?

Mr. Hatch: He does not. The premises belong to the Musto family.

Mr. Karesh: Isn't it true that the owner of the premises would not lease the premises to Kan?

Mr. Hatch: The building has belonged for many years to the Musto family, and has been leased for all these years to the Wong Chung Company, an exporting and importing firm, which in later years contracted for the use of the lower floor. At the time the Cathay House was started the upper two floors were rented by the Wong Chung Company to the Cathay House. Following numerous disputes between the Wong Chung Company and Mr. Kan the exporting company was no longer willing to rent the premises or lease the premises to any concern in which Mr. Kan had any interest.

Q. (By Mr. Karesh): Then it is true that any bid that might have been made by Kan would have been an idle act, because he could not have got the premises anyway?

Mr. Hatch: That would be difficult for me to answer. That was my opinion at the time and is my opinion at this time. [43] However, Mr. Kan's theory was that the lease was an asset of the partnership acquired by Mr. Kan while he was the agent of the partnership, and therefore he held it in a

fiduciary capacity, and he bid up to just under \$25,000 on that theory, that he could enforce it, I guess, and then did not want to go any higher.

Mr. Scholz: Mr. Hatch, as I understand it, Mr. Tsang bid in and purchased the Cathay House.

Mr. Hatch: He was the sole purchaser.

Mr. Scholz: And it is now being operated as a partnership in which Mr. Kan has no interest?

Mr. Hatch: That is correct.

Mr. Scholz: And also I think, Mr. Hatch, that you stipulated to this, that the partnership was formed while Mr. Kan was in the Army, because you advised it for tax purposes?

Mr. Hatch: The facts in that regard are that the corporation was making a profit of in the neighborhood of \$60,000 a year. That was during the period when we had excess profits taxes. The tax rate of corporations was 95 per cent, and in order to minimize that I advised that they operate as a partnership, and I drew up the articles of partnership. Mr. Kan was away, but his wife had his power of attorney. Mrs. Kan took the document to Mr. Sidney Romer, who was the attorney for Mr. and Mrs. Kan, and Mr. Romer approved the document, whereupon Mrs. Kan signed her husband's name and her name.

Mr. Scholz: I asked you if you could stipulate to that [44] point, Mr. Hatch.

Mr. Hatch: I will not make a partial stipulation, because if I did it would only be part of the truth.

Mr. Scholz: That is all I wanted to know.

Mr. Scholz: Will you stipulate that prior to Mr. Kan leaving Mr. Tsang was receiving \$500 a month?

Mr. Hatch: There is no dispute about that; prior to Kan's leaving Tsang was receiving \$500 a month, and after Mr. Kan left Mr. Tsang's salary was raised to \$750 a month, and remained such until the end of the partnership.

Mr. Scholz: Will you take the stand, Mr. Kan?

JOHN J. KAN

recalled;

Direct Examination
(Resumed)

By Mr. Scholz:

Q. Mr. Kan, on your return from the service in the armed forces of the United States, it has been stipulated Mr. Tsang was still acting as general manager or as one of the two general managers.

A. I believe he was acting in the capacity of manager.

Q. Was there anybody else occupying the position that you had when you left for service?

A. Not occupying it under that title.

Q. Was there anybody else in there doing the same kind of work that you did?

A. Yes, there was a man on the floor, and I believe there was [45] another girl who was employed; there were two.

Mr. Scholz: I think that is all.

Mr. Karesh: Have you stated what the duties of the new man were?

(Testimony of John J. Kan.)

A. Yes, the duties of the new man were to act as a host to seat the people, to supervise.

Q. Was it similar to the job you performed?

A. It was in a way similar.

Q. At any time have you been offered the position as one of the general managers since your return from the service of the Cathay House?

A. No.

Mr. Karesh: That is all.

Cross-Examination

By Mr. Hatch:

Q. Mr. Kan, is it true, is it not, that the Cathay House at the beginning was operated as a corporation? A. Yes.

Q. It operated as a corporation up to October 1, 1943? A. I think that is true.

Q. And from October 1, 1943 up to October 1, 1946 it operated as a limited partnership?

A. That is true.

Q. And it is true that none of the times was Mr. Tsang the operator of the business in his own name?

A. That I don't know, because I never seen the limited partnership [46] papers.

Q. Do you know of any time when Mr. Tsang was the sole proprietor and owner of the business?

A. No.

Q. You were the person who filed the suit in the Superior Court for the dissolution of the partnership, were you not?

(Testimony of John J. Kan.)

Mr. Scholz: I object to that on the ground it is immaterial, irrelevant, and incompetent.

The Court: The objection is overruled.

A. Yes.

Q. (By Mr. Hatch): And in that connection you have been continuously represented from the inception until the present time by Judge Ames and Mr. Sidney Romer, who is here in court? A. Yes.

Mr. Scholz: Just a moment. In our view this entire line of interrogation is beside the issue. I do not want to keep interrupting by objecting to the questions, so may it be stipulated, if your Honor please, that my objection goes to this entire line of questioning?

The Court: The record may so show.

Mr. Hatch: That is agreeable.

Q. It is a fact, is it not, that you brought this matter of the restitution of your position to the office of the United States Attorney long before you brought the suit for dissolution?

A. That is right.

Q. It is also a fact that at the time when you first brought [47] the matter to the attention of the United States Attorney and the Selective Service organization, that that was before you filed your cross-complaint in the action that was tried before Judge Deasy? A. Yes.

Q. So that you were aware at the time that you embarked on your litigation in the State Court that there was a Federal phase to the problem?

A. That is right.

(Testimony of John J. Kan.)

Q. It is true, is it not, that while you were in the Army your wife had a general power of attorney from you? A. That is right.

Q. And she remained in San Francisco during the time you were away? A. That is right.

Q. And she worked at the Cathay House as an employee? A. That is right.

Q. It is your understanding, is it not, that whatever assets there are pending in the receivership you are to receive your share of the distribution?

A. As I understand.

Q. And that by stipulation there has been a partial distribution of the sum of \$100,000?

A. That is correct.

Q. And you received 10/97ths of that? [48]

A. That is correct.

Q. That is during the pendency of litigation here? A. Yes.

Q. You also since the expiration of the corporation activities on one or two occasions received 100 per cent dividend from the operations of the partnership? A. I do not recall right off-hand.

Q. You got at least one?

A. I received one dividend.

Q. Were you aware up to this time that in the dissolution proceedings that Jude Foley had made an order prescribing the time within which any claim must be filed against the receiver?

Mr. Scholz: If your Honor please, we object to any questions as to the receivership, because we do

(Testimony of John J. Kan.)

not think it is part of the case; it is immaterial, irrelevant, and incompetent, and has nothing to do with the case. May it be stipulated that our objection will go to the interrogation?

The Court: For the purpose of the record, indicate the purpose of the offer.

Mr. Hatch: The purpose of the offer is this, if this is a claim as stated by counsel, that if successful it would be paid out of the partnership fund in receivership assets, then, of course, he should have presented a claim there instead of prosecuting this action against Mr. Tsang as an individual when he, Kan, had an opportunity to present his claim to the receiver [49] and bring the receiver before the court.

Mr. Karesh: Isn't it true that since the suit is pending that the Superior Court did not order a complete dissolution?

Mr. Hatch: I do not think so. Judge Foley has very definitely indicated in his opinion the contrary.

The Court: For the limited purpose of the offer I will allow it.

Q. (By Mr. Hatch): Were you aware that Judge Foley fixed a time limit within which all claims could be filed against the receivership?

Mr. Scholz: Objected to as incompetent, irrelevant and incompetent, and nothing to do with the case. May it be stipulated that any interrogation as to the receivership the same objection is made?

Mr. Hatch: We have that understanding.

A. Will you ask that question again?

(Testimony of John J. Kan.)

Q. Did you know that Judge Foley made an order that all claims against the receivership would have to be filed on or before a certain date, and as a result of that you did file a claim over there?

A. No; most of the claims were filed through Mr. Romer.

Q. You filed no claim, however, against the receiver or the partnership with respect to any damages for non-employment?

A. That I don't know.

Q. You don't know that you filed any? [50]

A. No.

Mr. Hatch: Now, I would like to know what we are going to do about these voluminous records. Counsel indicated in open court sometime before the possibility of stipulating that they be read, but he wanted, however, to have Mr. Kan's personal testimony. Now, I had the testimony of Mr. Kan taken on numerous occasions, the deposition before suit was filed in the State court, also his testimony before Judge Deasy. I wish to bring before the court now in proper form that evidence, to show that the testimony that he has given today is in conflict with the testimony he gave at that time, and that he did not recall upon these early occasions, when his recollection should have been fresh, he did not recall the things he testified to at the present time. The only way I can accomplish that is to either have the court receive those documents in toto, or to read them in toto, because that is the only way I can prove a negative.

(Testimony of John J. Kan.)

Mr. Karesh: I am going to say this, you have gone along without laying any foundation for the purpose of impeachment. You will have to ask him those questions, or otherwise we will ask that the witness be permitted to step down from the stand.

The Court: Have you got the transcript you refer to here?

Mr. Hatch: Yes.

The Court: State the purpose for the record.

Mr. Hatch: My purpose is to prove that this gentleman did not [51] recall on those occasions the things that he testified to now; in other words, I am attempting to prove the negative; the only way I can do that is not to find something in there he did testify to, but read the entire transcript to show that he did not recall any of them. This is the only way I can prove that. My offer is to show that on previous occasions Mr. Kan did not testify to what he testified to today, and that he was interrogated upon those subjects.

The Court: Lay the foundation for that.

Q. (By Mr. Hatch): You remember, Mr. Kan, that your deposition was taken in my office prior to the trial before Judge Deasy? A. Yes.

Mr. Scholz: If your Honor please, I believe that the witness has a right to be shown the document in question.

Mr. Hatch: Yes, he is entitled to it. The deposition was taken on January 3, 1945, and January 11, 1945.

A. I don't remember the dates. I remember there were several depositions taken.

(Testimony of John J. Kan.)

Mr. Hatch: I do not have a certified copy of that document, and I do not think the Federal Rules permit proving it by certification. The only way, unless there is an admission, would be by having the reporter who took that deposition come out and testify. I will state to the court this is a true copy of the deposition that was taken at that time and place and was acknowledged before Notary Public Alfred D. Martin. [52] I will offer that in evidence, if your Honor please, to show the detail of the story as given by the witness as to what transpired in the partnership with Mr. Tsang before then and what transpired in conversations with Mr. Tsang after that, and that that detail was not related at the time that he was interrogated upon those subjects.

Mr. Karesh: May I make this observation. Counsel had a full opportunity to take the deposition of Mr. Kan. He cannot use a deposition in the State court for the purpose of impeachment; he will have to ask the witness if he specifically said that, and give him a chance to explain his answer, and we object to the offer of that particular deposition in evidence.

The Court: You will have to lay a foundation for that and interrogate the witness.

Mr. Hatch: I might make this statement, the fact that this deposition was taken in the State court, or otherwise, neither adds to nor subtracts from the value of this as evidence, and if it is a document which is subscribed by the witness and is contradictory to his present testimony it may be received.

(Testimony of John J. Kan.)

Mr. Karesh: We object to the deposition. As I stated, you cannot read that into the record.

Mr. Hatch: The only way I can show to your Honor that he did not testify about recalling that which he now says he does is to read the testimony in its entirety.

Mr. Karesh: That is improper cross-examination, for the [53] purpose of impeachment.

The Court: Proceed. If it is necessary to do so it will be done.

Mr. Scholz: Your Honor has ruled on that three times.

The Court: Let us proceed.

Mr. Karesh: I ask that you ask the question and see whether he said a particular thing, and give him a chance to explain.

Mr. Hatch: We will be here a long time if you insist on that. I would make this suggestion, because it was apparently agreeable to Mr. Karesh before, that the document be received in evidence and your Honor defer ruling as your Honor made a ruling on my motion for nonsuit.

The Court: It may be if you renew that offer at the proper time I will allow it, but the foundation has not been laid for the admission of it now.

Mr. Hatch: The only way I can prove this is by the testimony of the reporter.

Mr. Karesh: The reporter cannot add anything to the transcript. The only proper way to do is to ask him did he say this, and give him a chance to explain.

(Testimony of John J. Kan.)

Mr. Hatch: I would prefer to characterize it in relation to proving the facts rather than impeachment.

The Court: The only thing the court is concerned with here is seeking the truth.

Mr. Hatch: That is the only basis upon which we offer evidence, your Honor.

The Court: Proceed.

Q. (By Mr. Hatch): Have you glanced through that testimony? A. Yes, I have.

Q. Those are the answers you gave to those questions? A. I imagine so.

Mr. Scholz: If he is offering it now for the purpose of impeachment, we object to it. I think since the witness is here present the direct question should be asked of him.

The Court: What is before the court now?

Mr. Scholz: The question whether he gave that testimony, or not.

Mr. Hatch: I think he has.

Q. I would like to direct your attention to the transcript, beginning on page 80, and ask that you familiarize yourself either now or at your convenience as to whether those are the answers given in response to those questions. [57]

A. Page 80?

Mr. Hatch: I think that is the beginning of his testimony.

The Court: Let him read the question and answers on that particular page.

(Testimony of John J. Kan.)

Q. (By Mr. Hatch): Are those the answers you gave to those questions? A. Yes.

Mr. Karesh: Let the court know what they were.

The Court: If there is any objection you have to make, wait until the question is propounded.

Mr. Karesh: The objection is that he has not laid the proper foundation to read the question to the court.

The Court: Give him an opportunity to do that. Maybe he will do that. There is nothing before the court to object to.

Mr. Hatch: At this time I offer in evidence as defendant's exhibit the document which the witness has identified as containing his answers to the questions.

The Court: The objection will be sustained to them.

Mr. Hatch: First was the deposition. And I make the same offer in reference to the transcript.

Mr. Karesh: The same objection.

The Court: The same ruling.

Mr. Hatch: I have no further questions.

Mr. Scholz: If your Honor please, I offer in evidence as part of the petitioner's case a letter written on the stationery [58] of the stationery of the Cathay House, similar to the stationery heretofore introduced in evidence, except that the name John J. Kan is stricken out and it is dated February 1, 1946. I will read it:

(Testimony of John J. Kan.)

“To the Members of the Cathay House, a Limited Partnership:

“I have deferred writing this letter for a long time, waiting first to be sure that I am doing the fair thing. As you know, the partnership has been operating under a sublease to me. One of the partners admittedly went to the landlord a while back and tried to get a lease to the restaurant running in his own name, undoubtedly with the intention of throwing the rest of us out. The landlord refused this request and insists that he will rent only to me.

“During the past several years certain of the partners have done everything within their power to destroy the business and generally to make trouble. This has resulted in a great deal of unpleasantness and expense. The courts now have declared that all of the charges made against us were false and untrue.

“Reluctantly I have reached the point where I am no longer willing to continue to allow the lease to run for the benefit of people who act as certain of the partners have. I feel that there is no appreciation on their part for the opportunity which I have made possible, that they participate in profits out of this lease. [59]

“I have not the slightest doubt that had these people been able to get the lease away from me, they would have shut me out immediately.

(Testimony of John J. Kan.)

“Therefore, I wish to say that I intend to have the property of the partnership appraised and offered for sale at an early date. Anybody who wants to bid on it has that privilege. A notice will be mailed to each of you, informing of the amount of the appraisal and the date the property of the partnership will be put up for sale.

“Very truly yours,
Ernest Tsang.”

The Court: It may be admitted and marked.

(The letter was marked Plaintiff’s Exhibit 5, in evidence.)

Mr. Hatch: What is the date of that?

Mr. Scholz: February 1, 1946.

Q. (By Mr. Hatch): Mr. Kan, it is true, is it not, that previous to the date of that letter you went to the Wong Chung Company and tried to get the lease in your name? A. I did not.

Mr. Hatch: No further questions.

SIDNEY A. ROMER

called as a witness on behalf of petitioner; sworn.

The Clerk: Will you state your name to the court?

A. Sidney A. Romer. [60]

Q. (By Mr. Scholz:) Mr. Romer, you were present in court this morning, were you not?

A. Yes, I was.

(Testimony of Sidney A. Romer.)

Q. Did you hear Mr. Kan testify that he had a conversation on January 24 in which you were present? A. Yes.

Q. Were you present at that time?

A. Yes, I was.

Q. Will you state who were present?

The Court: January 24th of what year?

Mr. Scholz: What year and who was present?

A. It was January 24, 1944. Present were Mr. John Kan, Robert Hatch, Ernest Tsang, George Chew, and myself.

Q. Where did that conversation take place, or where did that meeting take place?

A. At Mr. Hatch's office.

Q. Will you state what was said and what was done at that meeting with respect to the controversy here?

A. Yes: I came into Mr. Hatch's office with Mr. Kan and stated that I was there because I had been informed that we were to discuss the terms of a release to be signed by Mr. Kan, a contract to be executed——

Mr. Hatch: Pardon me. I am going to object.

A. (Continuing): ——I am making a statement as to what I said when I came into the room.

The Court: His statement at that time and place. [61]

A. That I had come prepared to discuss the release that Mr. Kan was to execute, the contract that was to be given him for re-employment, and assignment of his interest in the business to Mrs. Kan. I was immediately informed that such was

(Testimony of Sidney A. Romer.)

not the case, at all, that Mr. Kan was simply expected to sign a release of all claims and assign his interest to his wife, without receiving any preference of any nature; if he did so that he would be re-employed at the Cathay House at \$500 per month. I said that I could not recommend his signing a release and getting nothing whatever in return, he would be giving away all his rights under the Selective Service Act, as well as any right that he might have of which he might not even be aware, and that if he were to sign a release he must have a contract; that if no contract were to be granted then no release should be signed. I asked why he could not be permitted simply to return to work at the Cathay House without any contract, without any agreement of any nature. I was informed that was not possible, that the release was a prerequisite. Mr. Kan was in full agreement with me; at the time I asked him in their presence if he was willing to return to work without any agreement and go back at a salary of \$500 per month, and he said he would; that not being possible it was my suggestion, or Mr. Hatch's, I believe it was mine, that perhaps these two people who had known each other so many years, had worked together, were being incumbered by too many attorneys, and perhaps if [62] they discussed the thing between themselves they might arrive at some basis on which Kan could go back to work, and that was the basis on which that meeting broke up.

Mr. Scholz: That is all.

(Testimony of Sidney A. Romer.)

Cross-Examination

By Mr. Hatch:

Q. Mr. Romer, is it your intention to convey to the court that you are quite certain that the matter of Selective Service, GI Bill of Rights, was specifically discussed at that meeting, or is that merely your impression?

A. No, I am quite certain that the Selective Service Act was discussed at that time. I can recall a statement by you—I can add a little to what I have said. I can recall a comment at the time by you that the release would be a release of everything and that actually Kan had no claims of any kind, had no right to be re-employed, that it was a kind gesture, or words to that effect, on the part of Mr. Tsang to take him back at all in any capacity, and I asked him, “Are you exempting the provisions of the Selective Service and Training Act as far as rights that he has,” and I don’t recall what your reply was to that, or whether you specifically replied or said that you did not think so.

Q. Then you would say there was no two-sided conversation on that subject there?

A. I don’t think you got into any discussion of the question of the Act at that time, but I do very definitely recall that [63] I brought it up in some manner.

Q. You are not undertaking to state at this time that either my client or I made any specific mention or reference to any rights that Mr. Kan might have under the Federal law?

(Testimony of Sidney A. Romer.)

A. I raised the point at the time, I believe I discussed it.

Q. You do not recall, or you do not state that anybody on my side of the picture made any statement or indicated to you that we were aware of that law?

A. No, I do not believe you dignified it in any way.

Q. Is this a fair description of that phase of the meeting as disclosed by your testimony before Judge Deasy?

A. A little more time has elapsed, but I think it was the same.

Q. That was back in 1945. Now, reading from page 74——

Mr. Scholz: Is this for the purpose of impeachment of the witness?

Mr. Hatch: It is not impeachment, it is a matter of refreshing the witness's recollection.

Mr. Karesh: Show him the transcript.

Mr. Hatch: I refer to page 74, beginning line 16. Will you read it?

A. Yes.

Mr. Hatch: May I read it, your Honor?

The Court: Yes.

Q. (By Mr. Hatch): Judge Ames was your associate in that case?

A. That is correct.

Mr. Hatch:

“Mr. Ames: I dislike to interrupt, but may I ask at that time whether the Selective Service and Training Act was mentioned at that meeting?

(Testimony of Sidney A. Romer.)

A. My recollection is it was specifically mentioned in reply to a comment of Mr. Hatch, that there were no rights that Mr. Kan had, and that I replied, or I said, 'Are you exempting the provisions of the Selective Service and Training Act?'

Q. And did he reply to that?

A. Nothing of a very definite nature that I can recall, or that he felt that it would not apply under any circumstances, something like that."

Q. That was the extent of your description of that phase of the meeting when you were testifying before Judge Deasy?

A. Yes, that is about the extent of it today.

Q. There was only one meeting on this subject that you ever attended, and that was the one of January 24, 1944?

A. That is right.

Q. And that is all of the testimony given before Judge Deasy on that subject?

A. Yes.

Q. So that there will be no peradventure of a doubt about this, you do not recall or attempt to testify that there was any discussion on the part of my client or myself in reference to the Selective Service Act or GI Bill of Rights, or any other [65] Federal law?

A. Nothing beyond what I have stated.

Q. That was none?

A. It goes beyond none from what you have read there, and what I recall I testified, in other words I raised the point.

(Testimony of Sidney A. Romer.)

Q. It is fair to say, is it not, that there was no discussion between the parties with relation to the Selective Service Act, whether it would be exempted from the provisions or otherwise?

A. No, I think it was simply a discussion between you and I.

Q. You know, do you not, that at that time you did not convey to me or my client any claim that Mr. Kan might have some rights under the Federal Law?

A. Simply what I testified to, Mr. Hatch, that I raised the point of the Selective Service Act.

Q. Just by that one question as to whether I was exempting the provisions of the Selective Service and Training Act and there was no response from me, that you recall?

A. I recall nothing definite.

Q. (By Mr. Karesh): It is true, is it not, that one of the conditions of re-employment was the signing over by Mr. Kan of his stock to his wife?

A. Yes, I testified to that.

Q. That was at the request of Mr. Tsang, was it not? A. Yes.

Q. (By Mr. Hatch): Getting to the definition of what was related [66] to you by Mr. Kan, and what was related to you by me, wasn't that something which Mr. Kan told you before you came into the meeting?

A. Yes, because I came prepared to go into the details that we would get for the preparation of these documents, specifically expecting to work them out with you.

(Testimony of Sidney A. Romer.)

Q. But after you came to the meeting and announced that you would insist upon a contract for three years or more, then there was no discussion, was there, of any transfer of any interest by Mr. Kan to Mrs. Kan?

A. I do not recall what further discussion there may have been, because you immediately effectively terminated the conversation by stating that no contract of any nature was intended, and that he was simply to sign a release.

Q. Isn't this true, in substance, that the meeting amounted to this, that you came in there, stated your understanding of what you were there for, and that included a contract for Mr. Kan you stated that Mr. Kan wanted the contract for a period to be negotiated either for the duration of the war, or for a three-year period, or some other term satisfactory to the parties?

A. I believe that is correct.

Q. That is correct? A. Yes.

Q. And as soon as you stated that there was nothing else discussed [67] in the meeting because I announced that we were unwilling to enter into any such contract?

A. You announced no contract whatsoever had been consummated, and that we would not enter into one, and there was no necessity of Mr. Tsang having to re-employ Mr. Kan, it was simply a gesture out of the kindness of his heart.

Q. Furthermore, after that suggestion it is now your recollection, is it not, that at the meeting there was no discussion about Mr. Kan transferring his interest to his wife?

(Testimony of Sidney A. Romer.)

A. I do not recall if there was any further discussion. You made the statement that you were where you started because the other things became moot.

Q. I rather gathered from Mr. Karesh's question of you that it was to be inferred that I had made the transfer to Mr. Kan's interest to his wife a condition precedent to his re-employment, and that condition precedent, that requirement was stated to you during this meeting.

A. I believe we did initially discuss it; that was one of the three things that were to be done that day.

Q. Now, getting back to this, it seems to be quite clear we never got around to discuss that because we were not agreeable to your primary proposition, that is to say, that Mr. Kan have a contract of three years.

A. I don't think we got into any considerable discussion on that point. [68]

Redirect Examination

By Mr. Karesh:

Q. Isn't it true that any re-employment of Mr. Kan was conditioned upon his signing a release?

Mr. Hatch: I object to that. The witness has already testified that there was nothing said at that time.

Mr. Karesh: I am asking about his understanding. You opened up that phase of the matter. I have a right to ask him his understanding about that particular phase.

The Court: What particular phase?

(Testimony of Sidney A. Romer.)

Mr. Karesh: Whether or not the condition of re-employment of Mr. Kan was that Mr. Kan would have to sign a release and transfer his stock to his wife, isn't that correct? A. Yes.

The Court: That may go out.

Mr. Hatch: From what his client told him before he came to the meeting is not binding on us. I have no objection to his testifying in full detail as to what occurred at the meeting.

Mr. Karesh: I can ask his understanding.

The Court: What his understanding was is a conclusion unless it is directed to some particular phase.

Q. (By Mr. Karesh): Wasn't it your understanding at that meeting that Mr. Kan would not be re-employed unless, 1, sign a release, and, 2, transfer his shares of stock over to his wife?

A. Yes.

Q. Wasn't that your understanding from what took place at that [69] meeting? A. Yes.

Mr. Hatch: I ask that the answer be stricken.

The Court: I will allow the question and answer to stand subject to your motion to strike and over your objection.

Q. (By Mr. Karesh): And your understanding was as a result of what was said in the meeting?

A. My testimony as to the specific conversation in Mr. Hatch's office on January 24, 1944, on the subject of the release, was not based on any particular understanding communicated to me from some other source, but was based on the discussion we had in his office at that particular time.

(Testimony of Sidney A. Romer.)

Mr. Hatch: Then I move to strike out the answer on the ground that he has already testified as to what was said and done.

The Court: I will allow the question and answer to stand.

Mr. Karesh: Now, your Honor, we objected to the testimony concerning the filing of the suit in the Superior Court, and your Honor overruled the objection. Under the circumstances I am going to ask whether he can explain the circumstance of the filing of the suit in the Superior Court.

A. Which action?

Q. In the first action, the action in which we have the transcript here.

Mr. Hatch: He did not file the suit. [70]

A. Mr. Hatch filed that suit.

Q. I mean when Mr. Kan filed a cross-complaint. Let me get these proceedings straight.

The Court: We will take a recess.

(After recess:)

Mr. Karesh: May it please your Honor, after reflection I would ask permission to strike the last question I asked as to the case in the Superior Court. He did not answer it.

The Court: What was that about?

Mr. Karesh: I asked about the action in the State court. As I understand it, Mr. Tsang filed a suit and Mr. Kan filed a cross-complaint. I am not going to examine Mr. Romer about that. That is all.

JOHN J. KAN

recalled.

By Mr. Karesh:

Q. Your testimony has been that you applied for re-employment at the Cathay House on or about December 4, 1943, is that correct?

A. That is correct.

Q. From December 4, 1943 to December 4, 1944, you were employed by Tiedemann & McMorran, is that right? A. Yes.

Q. At 101 Mission Street, San Francisco, California? A. Yes. [71]

Q. You had no other employment except the employment with Tiedemann & McMorran during that period? A. That is right.

Q. Your withholding receipt for 1945 is \$2340. Refreshing your recollection from those figures, would you say that you earned approximately \$2340 from December 4, 1943 to December 4, 1944?

A. That is right.

Mr. Karesh: That is all.

Cross-Examination

By Mr. Hatch:

Q. Was that all your income for that year outside of the dividends from the Cathay House?

A. Yes, that is all.

Mr. Hatch: That is all.

Mr. Karesh: I would like to call Mrs. Kan, your Honor.

HELEN KAN

called as a witness on behalf of petitioner; sworn

The Clerk: Will you state your name to the Court?

A. Helen Kan.

Q. (By Mr. Karesh): You are the wife of the petitioner? A. I am.

Q. During the period that your husband was in the armed forces you were employed at the Cathay House? A. I was.

Q. And you had occasion in your employment to observe the work [72] done by Mr. Kan, is that correct? A. That is correct.

Q. Will you tell this Court, of your own knowledge, whether during the period your husband was in the service Mr. Tsang did any additional work than that which he had performed when your husband was working?

A. Not that I know of, because he employed another man to take my husband's place by the name of Henry Lee.

Mr. Karesh: That is all.

Cross-Examination

By Mr. Hatch:

Q. Do you know what the other man was paid?

A. No, I do not. I did not have access to the books.

(Testimony of Helen Kan.)

Q. Are you aware that this other man, whoever it was, did not do nearly as much work as your husband did when he was there?

A. Well, my husband had done advertising and it was all laid out, anyone could follow such a system.

Q. This other man, what was his name?

A. I know his first name was Henry, and I believe his last name was Lee.

Q. Did Henry receive the customers that came on the floor? A. That is right?

Q. Did he do anything else?

A. Not that I know of.

Q. Your husband testified that he did marketing, and all of these other things you heard him testify to today? [73] A. Yes.

Q. Mr. Henry Lee, however, did not do any of those things your husband did, except to receive the customers as a sort of head waiter, isn't that correct? A. As far as I know.

Mr. Hatch: No further questions.

Mr. Karesh: He didn't do any marketing, did he? A. No, that was up to the kitchen staff.

Mr. Karesh: That is all.

Mr. Hatch: I should like to recall Mr. Romer for further cross-examination.

The Court: Proceed.

SIDNEY A. ROMER

recalled.

Cross-Examination
(Resumed)

By Mr. Hatch:

Q. Mr. Romer, you were one of the attorneys in the case of Kan vs. Tsang, in the State Court, in San Francisco, No. 349,840, as testified to by Mr. Kan? A. Which action was that?

Q. That was the dissolution proceeding.

A. Yes.

Q. It is true that you initiated that action by filing it with the County Clerk on February 13, 1946?

A. You have the papers there. I am satisfied with your statement [74] of it.

Q. It is true that a decree of dissolution was entered in that case prior to today?

A. Yes.

Q. That decree was entered by stipulation of all the parties, including your client?

A. I do not recall the manner in which it was entered at this time, Mr. Hatch.

Q. I would like to refresh your recollection from the document here.

A. I would be glad to have it done.

Mr. Karesh: Of course, I will object to all of this testimony.

The Court: Proceed.

Mr. Hatch: I might call to your attention it is on your stationery. A. That is what it shows.

(Testimony of Sidney A. Romer.)

Q. It is true that the Court appointed a receiver in that case and that the receiver is still in office? A. Yes.

Q. It is true that prior to this date that the court in that case made an order prescribing the time within which claims could be filed? A. Yes.

Q. It is true that Mr. Kan filed one or more claims with the receiver [75] in that action?

A. Yes.

Q. It is true that he filed no claim with the receiver predicated upon or related to the action pending before this court?

A. I believe there was a flat claim of \$20,000 filed, Mr. Hatch.

Q. That claim was by me, if I may remind you, on behalf of Mr. Tsang.

A. I recall an additional claim being filed by Mr. Kan. Judge Ames prepared that claim, but I recall having seen it.

Q. Put it this way: You know that subsequent to the expiration of that period the receiver filed his report with the court and while I filed certain objections to the report that none were filed by your office, or by Mr. Kan?

A. That is correct.

Q. And in that respect any claim which Mr. Kan might have filed has been abandoned by now?

A. No claim filed with the receiver?

Q. Yes. A. I suppose that is true.

Q. No such claim is being pursued by Kan against the receiver at this time?

A. That is true.

(Testimony of Sidney A. Romer.)

Q. And that the Court is proposing in the State proceeding to conclude the receivership and the dissolution of this partnership without regard to the pendency of this action? [76]

A. I don't know what the Court proposes to do.

Q. You have not been present in the later proceedings? A. No.

Redirect Examination

By Mr. Karesh:

Q. Since there has been something said about the petition for dissolution, can you explain to the Court why it was Mr. Kan and these other two partners filed a petition for dissolution of the partnership?

A. The specific grounds, as I recall them, were dissipation of the assets. Mr. Tsang had threatened to dispose of or have the lease terminated, the lease under which the partnership occupied the premises, the Cathay House, and the Court ruled that whatever rights there were in the lease were held for the benefit of the partnership, that no one person could take them for his own benefit. The letter that you have there that you have read in evidence——

Q. Plaintiff's Exhibit 5?

A. (Continuing): ——was actually the basis for the action for dissolution, to prevent further dissipation of the assets.

Mr. Hatch: I do not think anything could be gained by developing the contentions of the parties underlying the dissolution. It is before the court that the partnership was going to expire two months

(Testimony of Sidney A. Romer.)

later, and without wanting to embarrass Mr. Romer, who is a good friend of mine, I am quite confident if they had looked at the articles of the partnership they would have never asked for dissolution, but the sum and substance of it was and is that the individuals did not get along together.

Mr. Karesh: We do not want to go into that.

Mr. Hatch: You brought it up.

The Witness: Could I perhaps make a voluntary statement, that we were thoroughly aware of the date that the partnership would terminate, but the purpose of the petition was to conserve the assets and preserve the lease and everything possible to see that the assets were on hand three months later that were on hand at the time the threat was made to dispose of them. That was the purpose of the action.

Q. (By Mr. Hatch): Isn't it fair to say that after facts were developed and the receiver reported they found that everything was in the best of condition so far as the accounts and money and everything from a commercial accounting view?

A. That is right.

Q. Were you present at the time of the sale in court over there? A. No, I was not.

Q. You know from the records in the case that what was sold was the physical assets of the business, together with the license? A. Yes.

Mr. Karesh: And the good will?

A. That is correct, and the name. [78]

Q. And all of the work that Mr. Kan put in to build it up? A. Yes.

(Testimony of Sidney A. Romer.)

Mr. Hatch: That should be qualified. Under the law the partnership has no good will when it expires in a period of three months.

The Court: What about this witness?

Mr. Hatch: That is all. Does the Government rest?

Mr. Scholz: The Government rests.

Mr. Hatch: At this time I move the Court for an order of nonsuit, a judgment of nonsuit and dismissal, particularly emphasizing that the only defendant in this case is Ernest Tsang as an individual.

The record affirmatively shows from the testimony of Mr. Kan, himself, that he was never employed by Ernest Tsang. He was employed first by the corporation, and only by the corporation. It is possibly arguable that if the corporation was legally obligated to have restored Mr. Kan to his position, that the partnership took over that responsibility as a continuation of the corporation; it would be on the theory that there was no division of entity.

Be that as it may, this action obviously is not asserted against the partnership, nor against the receivership, which would be the same thing. The suit is against several individuals, not all of the partners, alleging that they are partners in the Cathay House; they do not sue the Cathay House, they [79] sue certain individuals.

It now develops that Mr. Tsang, the only defendant on trial, never was an employer, therefore never could have been obligated to return this man to his

position. In that regard, Mr. Tsang is clearly beyond the pale of any theory of continuation of employer's identity. His connection as an individual began only after the sale of the assets in the receivership. He did not take over any liabilities of the business. He bought only the physical assets, together with what goodwill inured. The liabilities were something which were filed against the receivership. The receiver has charge of whatever liabilities were presented to him. This liability is not one to be asserted against a purchaser at a public sale. It should have been asserted, and may still be asserted against the partnership, inasmuch as the receivership has not been wound up.

I respectfully submit that the only person who possibly is responsible would be the partnership by and through the receiver; if they want to assert that remedy they have either a remedy in this Court by bringing him in as a party defendant, or by presenting a claim against him in the State Court, whichever they wish. That is the mode of procedure as I see it.

I make that motion and urge that the Court rule accordingly.

We have reached a point where it appears affirmatively that Mr. Tsang, as an individual, never had any liability which must be based against the employer, or one responsible as the employer. [80]

Mr. Karesh: That, your Honor, I feel is so extraordinary that I do not think it calls for an answer.

(After argument.)

The Court: Is the matter submitted?

Mr. Hatch: Yes.

The Court: The motion will have to be denied.

(An adjournment was thereupon taken until tomorrow, Thursday, September 11, 1947, at 10 o'clock a.m.) [80-a]

Thursday, September 11, 1947, 10:00 o'Clock A.M.

Mr. Karesh: May it please your Honor, Mr. Kan stated that he has earned approximately \$2300, he had a withholding certificate and that withholding certificate was for 1945 rather than 1944. He has checked with his employer since yesterday, your Honor, and he has the withholding certificate for 1944, and I would like to put him on the stand to correct that mistake.

JOHN J. KAN

recalled;

Q. (By Mr. Karesh): Mr. Kan, I think yesterday you testified that from December 4, 1943 to December 4, 1944 that you had earned approximately \$2300 with Tiedemann & McMorran. That is a mistake, is it not? A. Yes.

Q. You made a check and definitely ascertained how much you earned since last night?

A. Yes, I did.

Q. You checked with your employer?

A. I did.

Q. And for that twelve-month period it is approximately \$1518, is that right? A. Yes.

(Testimony of John J. Kan.)

Q. I am showing you your withholding receipt for 1944, and [81] that has approximately that amount of money?

A. That is right. Might I explain that this is from February 8, 1944.

Q. From February 8, 1944 to January 4, 1945 you earned \$1518.52; in other words, you did not go to work for Tiedemann & McMorran until February 8, 1944? A. That is right.

Q. Did you earn anything else during that period of time? A. No.

Mr. Hatch: What period of time?

Mr. Karesh: From December 4—the pertinent period would be from December 4, 1943 until December 4, 1944.

Mr. Hatch: I would assume in the absence of any authority to the contrary, the pertinent period would be one year from the time he indicated to the employer his willingness to return to work.

Mr. Karesh: However, it is our contention that he never told him he could go back to work.

Mr. Hatch: Put it this way, under the statute he would have to go back within 90 days or ask for a job. If he indicated that he was ready, able and willing to return to the same job that would have been the time when the employer would have been obligated, if at all, to restore him. If the employer refused that would start the one-year period. I do not know what date they claim that the plaintiff indicated his willingness [82] to return.

(Testimony of John J. Kan.)

Mr. Karesh: In any event, from December 4, 1944, until January 4, 1945 the petitioner earned \$1518.52, so that is approximately the period we are concerned with.

The Court: The evidence will disclose the matters that you have in mind?

Mr. Hatch: They do not yet. There is no evidence as to when the petitioner indicated his willingness to return to work.

Mr. Karesh: That was on December 4, 1943: that is right, is it not, Mr. Kan? A. Yes.

The Court: Let it be admitted and marked.

Mr. Karesh: I will leave this withholding receipt here and ask that it be received in evidence. You have no objection, have you?

Mr. Hatch: No.

(The withholding receipt was marked Plaintiff's Exhibit 6 in evidence.)

Cross-Examination

By Mr. Hatch:

Q. When did you first undertake to obtain employment other than at the Cathay House following your return from service?

A. In February, 1944.

Q. When did you go to work?

A. On February 8, 1944. [83]

Q. That was with Tiedemann & McMorran?

A. That is correct.

Q. You remained with Tiedemann & McMorran how long? A. Until January, 1945.

Mr. Hatch: That is all.

(Testimony of John J. Kan.)

Redirect Examination

By Mr. Karesh:

Q. As a matter of fact, in January of 1945 what was your monthly earning?

A. I only worked two weeks in January, 1945.

The Court: At this time I have another matter to take up. You may be seated.

(Recess.)

The Court: Now, Mr. Hatch, you may proceed.

Mr. Hatch: I wish to be sworn, your Honor.

ROBERT E. HATCH

called for the defendant; sworn.

The Clerk: Will you state your name to the court?

A. Robert E. Hatch. I have offices in the Mills Tower. I am an attorney at law, and have been for some years past admitted to practice in this court.

Mr. Karesh: Are you going to testify?

Mr. Hatch: Yes.

Mr. Karesh: I just want to tell you that if you testify you may waive your right to argue.

The Court: There will be no necessity of waiving any right. I have a procedure of my own here.

Mr. Hatch: I appreciate counsel's admonition; the rule however is that it is discretionary with the court, and it is not customary to deprive counsel of argument in a non-jury case. If the court wishes me not to argue it will say so. May I proceed now?

Mr. Karesh: Are you reading from a transcript?

(Testimony of Robert E. Hatch.)

Mr. Hatch: I am going to refer to two documents in my testimony; one is the deposition of John Kan and the other is the transcript in the case before Judge Deasy. Do you have copies of them?

Mr. Karesh: I have not the deposition of Mr. Kan and I have the transcript.

Mr. Hatch: I may have an extra copy of the deposition which I will let you have. [85]

Mr. Karesh: I am going to make an objection to your looking at the transcript and the copy of the deposition while you are testifying.

Mr. Hatch: If your Honor please, it is the proper procedure for the purpose of refreshing my recollection.

Mr. Karesh: You cannot refresh your recollection from anything Mr. Kan said; you had your opportunity of cross-examination of Mr. Kan on the stand.

Mr. Hatch: May I proceed?

Mr. Karesh: I register my objection now.

The Court: There is nothing before the court now.

Mr. Karesh: Except, your Honor, that counsel is looking at some transcripts.

The Court: I don't know what he is going to do.

Mr. Karesh: He said he is going to look at the transcripts.

The Court: He has a right to look at them. So that you have a record, what is the purpose of the offer?

(Testimony of Robert E. Hatch.)

have no occasion to bring up any of their past differences that they sign some little memorandum mutually releasing each of them against any possible claim and that they agree to let bygones be bygones; everybody was to start fresh and there was to be no more repetition of the opening of the old sores. In that respect I asked Mr. Kan whether he had any claim against the company; whether he was satisfied with the manner in which the business was being run; whether he was satisfied with the transition of the operations from the corporation to the partnership, pointing out the [88] saving to him in the matter of taxes. He said that was all right, it was satisfactory, that he had no claim of any kind. There was no mention of selective service in the slightest or anything akin to the GI Bill of Rights. The basis of discussion, as stated by Mr. Kan, was merely that he was back from service, he knew that business had improved, and that he wanted to come back and go to work, and he would see that he would be a faithful, reliable and valuable employe. There was the usual felicitation among the partners and parties present, that they were happy everything was solved and satisfactory and saw no reason why the future of the business and of the participants would not be a very happy one.

Q. (By Mr. Karesh): Will you state the parties present at that meeting?

A. Mr. Tsang, Mr. George Chew—if I recall he was the secretary of the corporation and one of the principal partners in the business—Mr. John Kan and myself.

(Testimony of Robert E. Hatch.)

At the close of the meeting, as they were about to depart, Mr. Kan said "this is all satisfactory to me; however, inasmuch as you"—addressing me—"are the attorney for the partners in the partnership, I think the best and proper thing would be for me to discuss the matter with my attorney, Mr. Romer, and see whether that is satisfactory to him before I make my final commitment, and unless Mr. Romer says there is anything wrong with this, it is all right with me, I will [89] go back to work at \$500 a month."

The Court: Is that the Mr. Romer who was a witness here yesterday?

Mr. Karesh: Yes.

The Court: Where is he today?

Mr. Karesh: He is not associated in the trial of this case.

The Court: There is testimony coming in here as to Mr. Romer.

Mr. Karesh: Counsel has not yet come to where Mr. Romer was present.

The Court: Mr. Romer was not present?

A. Mr. Romer was not present at the first meeting. I might state to your Honor that Mr. Romer's testimony, as he has given it, coincides literally; with one minor exception I will make, I agree wholeheartedly on what occurred. The meeting ended with an arrangement with Mr. Kan that he would let us know if Mr. Romer approved this arrangement. Following that meeting, within a day or so, I had a call from somebody, I forget from whom,

(Testimony of Robert E. Hatch.)

asking that we have a further meeting and have Mr. Romer attend. I had not known Mr. Romer before. On January 26 or 27, I believe the date was, I do not recall exactly—two or three after the first meeting, pursuant to appointment, the same parties were present with the addition of Mr. Romer. Mr. Romer and Mr. Kan came in to the meeting. After the usual pleasantries, Mr. Romer, being invited to state what his view points were, said that [90] he had discussed the subject matter with Mr. Kan, and that he felt the proper basis for Mr. Kan to return to work would be upon a written contract, not on a temporary basis which he was employed on before the war period.

Q. (By Mr. Karesh): Is that your conclusion or something that Mr. Romer said?

A. That is the exact phraseology or substance of what Mr. Romer said, and not my conclusion. I think I can cover that in a moment, Mr. Karesh. I told Mr. Romer promptly that there had been no discussion of any written contract; there had been no contemplation of such; and I would advise my people against entering into a written contract with Kan or anyone else for his employment at this place over an extended period of time, not knowing whether the employe was going to be a satisfactory employe. Mr. Romer said regardless of that Mr. Kan will not return to work, at least, that will be my advice to him, unless he does have a written contract. I asked him "what is the basis of your contract? Why should there be a contract when there was none before?" And he said in substance that

(Testimony of Robert E. Hatch.)

Mr. Kan was a minority interest holder and as such could not stay in if the majority wanted him to be discharged, and that under such circumstances he should have a contract. He said the period of it, he thought, should possibly be for the duration of the war, or in the alternative a three year period. I said to him that my advice to my people would be against entering into a contract of that sort. We then asked Mr. Kan if he was willing to return without a contract, and he said he was not. I said to Mr. Romer, if that is the situation we have little to discuss. I am sorry because at the last meeting it appeared that everything had been satisfactorily arranged, and that Mr. Kan was prepared to return on the same basis as before the war. I said that his position was still available to him on that basis but that we would not be agreeable to make an additional concession to him in view of the circumstances and particularly the history. The meeting was very short, rather abrupt, and very little discussion other than that because of the interjection of this new proposal and our unwillingness to meet that as a condition precedent to the return of the employee.

I wish to state to the court that there was to my firm knowledge no discussion or mention of the Selective Service Act or the GI Bill of Rights; I have that firmly in mind, and therefore testify to it as a positive fact, because that subject came to me as quite a surprise afterward when the litigation ensued. I was not aware at that time that there was this provision under the 1919 Act of Congress—

Mr. Karesh: 1940.

(Testimony of Robert E. Hatch.)

Mr. Hatch: I understood, I may be wrong, that this goes back to the First World War, and had I known there was such a provision it would have registered in my mind. I must [92] admit my complete unfamiliarity with any such federal provision at that time. As a consequence it was not discussed; otherwise it would have come to my attention and I would have made inquiry. There had been no mention of it in the first meeting and there was no mention of it in the second meeting.

When it came to the question of the mutual release that was to be executed formally or informally, to my recollection there was little and perhaps no discussion at the second meeting because we never reached that point. We were at loggerheads because of the interposition by Mr. Kan and his attorney of this requirement of a written contract of employment.

Furthermore, I testify that Mr. Kan was in error when he testified yesterday that there was a discussion of a contract at the first meeting. There was no discussion of a contract. To the contrary it was very definitely stated to Mr. Kan at the first meeting that if he came back to work it would be on the same basis as before the war, that is that he would be an employe the same as any other employe of the business. The gist of the conversation at the first meeting was with an emphasis upon the proposition that it would be an employment such as he had before over an indefinite period. I can't think of another point I wanted to recall; it has escaped my mind.

(Testimony of Robert E. Hatch.)

At the first meeting when I asked Mr. Kan as to whether he had any claim against the partnership, as I have just testified, he said he had none. He did not mention that he had any right [93] under any Federal or State law. As I stated the position that he asserted was merely that he had a job before he went in the service which was something he was equipped to do, and had what we might call a fraternal interest in the enterprise because he had been one of the promoters of it and had spent a substantial part of his life in building up the business and he wanted to go back in there because that is where his interests remained. There was no discussion whatever of a right to return but merely that he wanted to return and hoped that the partnership wanted him back. There was no discussion about his going back for any definite period of time either because he wanted to or because he had a right to.

In the discussion of this informal or formal mutual release there was no question raised by him or anybody else that that might be construed as a waiver of any right he might have under the Federal law because that subject was not mentioned or discussed. Had it been discussed there would have been a different line pursued in relation to the form of the document. The document incidentally was never drafted for the reason that when they came back at the second meeting they were unwilling to go back on any basis except their own terms which were unsatisfactory to the employer. And so far as I recall at the second meeting neither Mr. Romer

(Testimony of Robert E. Hatch.)

nor Mr. Chew got to the point of how much they wanted per month [94] because we were stymied immediately by the insistence of an extended period of employment.

That, if your Honor please, covers the substance of the two and only meetings that we had.

Now, insofar as I know or it has come to my attention, and I have been present in every proceeding in the ensuing litigation—Kan has never before yesterday testified that——

Mr. Karesh: Just a moment. Are you referring to these two meetings, or are you going to relate something which he might or might not have testified to?

Mr. Hatch: I am referring to all the times that I heard Mr. Kan testify.

Mr. Karesh: That is improper. Counsel cannot impeach Mr. Kan by certain statements that he says he heard or did not hear other times. He is limited to these particular times that he had the conversation with Mr. Kan.

The Court: There were two meetings held?

Mr. Hatch: That is right and I have testified to that. Now I wish to establish by my testimony that some of the features which Mr. Kan testified to yesterday have never been claimed nor asserted by him at any time before yesterday.

Mr. Karesh: I object to that, your Honor. That is obviously a conclusion to be reached by the court. Counsel has no right to clutter up the record with these self-serving declarations. [95]

(Testimony of Robert E. Hatch.)

The Court: If there is anything contradictory he may read it.

Mr. Hatch: Conflict in testimony, if I may suggest, is one thing. Absence of testimony is not a conflict with what a man testifies presently, but the fact is that when interrogated previously upon the same subject the witness did not testify as he presently does.

Mr. Karesh: I move that that be stricken.

The Court: It might be pertinent as indicating that he was not asked.

Mr. Hatch: Let me put it this way.

Mr. Karesh: Now, your Honor, counsel is an experienced counsel and he cannot get into the record now what he is trying to get. First of all he cannot get anything in the record at this time in an attempt to cast a slur on Mr. Kan. He had Mr. Kan on the stand during the deposition and you had the transcript and you had time to familiarize yourself with it, and you know the rules and you could have asked Mr. Kan if he said this on page 2 or page 10. I will ask, your Honor, that he be instructed to go on along those lines.

Mr. Hatch: May it please the court, I do not subscribe to that as being the law. My contention is that when a man testifies in court, and as he did yesterday identify these two records, the deposition and the transcript as being what he answered to the questions that are therein asked, I do not [96] have to ask him whether he gave those answers; he has stated them to be true. I now propose to show to the court that upon those occasions Mr. Kan——

(Testimony of Robert E. Hatch.)

Mr. Karesh: I am going to press my objection; you are getting into the record by indirection what you know that you have no right to.

The Court: He is stating his legal position; he has a right to do that. He is now stating what he proposes to show.

Mr. Hatch: I propose to show to the court at this time that on those occasions Mr. Kan has been interrogated at length and asked to testify as to what occurred at those two meetings, and I propose to show by my testimony as a person who was present at the time he testified, and by refreshing my recollection from these documents that he did not testify as he did yesterday.

The Court: That may be a good argument but you will have to lay a foundation as to the admissibility of that testimony.

Mr. Hatch: I was about to testify on that when I was interrupted.

Mr. Karesh: As I understand your Honor's ruling, laying a foundation would mean he would have to lay a foundation by asking Mr. Kan on the stand and asking him if he so testified. [97]

The Court: I am not concerned with indicating to counsel how to proceed. I am ruling here in relation to the matters presented. My thought is simply this, if you propose to contradict or challenge the testimony of the witness on the stand then I indicate that you should lay a foundation to do so, or show that you cross-examined on the matter that you now have in mind that you are going to repudiate so that we would have a proper record.

(Testimony of Robert E. Hatch.)

Mr. Hatch: I did not understand the basis of your Honor's ruling yesterday after the witness had testified these documents were correct transcripts and your Honor refused the documents in evidence, and I thought that was contrary to law. When Mr. Kan was on the stand I asked him to read these two documents, the deposition and the state court transcript; he read them and I asked him the question, "did you give those answer to those questions that are in there and he said "yes." I then offered the documents in evidence. I believe that there is adequate legal authority to support the foundation on that basis.

The Court: I don't know what ruling I made.

Mr. Hatch: I then offered——

Mr. Karesh: Let me explain——

Mr. Hatch: I am addressing the court and I prefer not to be constantly interrupted. These documents were immediately by me offered in evidence and your Honor rejected them. Whether that was a correct ruling or not is not of immediate consequence because I was present at the time that that testimony was given, [98] and as a witness I am entitled to testify as to what Mr. Kan said regardless of the transcript.

The Court: There is no question about that.

Mr. Hatch: There is no question about that. There is no compulsion on me to cross-examine the witness as to what he said because I have the choice of either attempting to break him down and take a chance that he will build himself up by volunteer

answers or proceed as my own witness, and that is what I intend to do. (After argument.) We are prepared to proceed now with my testimony independent of the transcript.

The Court: It is time for a recess, and I have some other matters to take up now.

(After recess.)

Mr. Hatch: Might I put Mr. Tsang on, he has some business to attend to.

The Court: Call him to the stand.

ERNEST TSANG

called for Defendant; sworn.

The Clerk: Will you state your name to the court?

A. Ernest Tsang.

Q. (By Mr. Hatch): Mr. Tsang, you are the defendant in this case? A. Yes.

Q. You first became connected with the Cathay House incorporated shortly after its incorporation?

A. That is correct. [99]

Q. At that time what occupation did you have?

A. I was in the employ of the United States Immigration Service.

Q. And had been for a period of years up to that time? A. Yes.

Q. How many years?

A. I would say around twelve or thirteen years.

Q. You got in the Cathay House by investing some money as a stockholder?

A. That is right.

(Testimony of Ernest Tsang.)

Q. Some time after that, shortly afterward, you gave up your government employment and spent your full time at the Cathay House? A. Yes.

Q. Ever since that time you have continuously spent all of your time working at the Cathay House?

A. That is correct.

Q. Without going into too much detail, during the first year with the Cathay House did you have successful financial operations?

A. Very unsuccessful.

Q. You were compelled to put in more money to save your investment, were you?

A. Yes, I was.

Q. You bought additional stock?

A. I did. [100]

Q. Mr. Kan on the other hand never put in any more than his original investment of \$1100?

A. That is right.

Q. When it was necessary to put up more money to save the business, did Mr. Kan refuse or state that he was unable to put up more money?

A. He stated both that he was unable and also refused.

Q. By the time that Mr. Kan went into the service did the preponderance of the outstanding stock of the corporation belong to you?

A. That is correct.

Q. Generally from the time you become connected with the Cathay House as a minority stockholder until you became a majority stockholder, what was the general relationship between you and Mr. Kan?

(Testimony of Ernest Tsang.)

A. Immediately after my becoming active in the business my presence seemed to be resented on the premises and at all times there was nothing but friction and bickering back and forth between us.

Q. Let me put it this way: at the time that you first bought stock, Mr. Tsang, Mr. Kan was the secretary of the corporation?

A. I believe he was.

Q. He remained on as such for a period of time?

A. That is correct.

Q. And also a director?

A. That is so. [101]

Q. And at one of the directors' meeting—I might state to the court that I thought I had the minutes in my office, but I find they are still over in the District Court of Appeals, I have not withdrawn them—at a meeting of the directors of the corporation did Mr. Kan attempt to vote you out of office? A. He did.

The Court: Lay the foundation, time and place.

Q. (By Mr. Hatch): Was it before he went into the service?

A. Yes, approximately September, 1940.

Mr. Karesh: You have not got the minutes?

Mr. Hatch: No, they are over at the District Court of Appeals. I could get them at noon time.

The Court: He said it was September, 1940.

Mr. Karesh: I do not see the relevancy of what happened in 1940, September, when he tried to vote somebody else out.

The Court: What is the purpose?

(Testimony of Ernest Tsang.)

Mr. Hatch: I wish to show that, among other things, that while I stipulated yesterday he had the ability to perform the duties of his job, that despite that, by his general conduct he had demonstrated himself to be an unsuitable employee and that it would be against all principles of law and equity for him to be restored to that job. That is one of the defenses under the Bill of Rights.

Mr. Karesh: May it please your Honor, I move that all of [102] the testimony in relation to this be kept out of the record. Mr. Kan was discharged long after 1940. Your stipulation was that he had the ability and you have foreclosed yourself from going into anything that might reflect upon the integrity of Mr. Kan.

The Court: The objection will be overruled.

Q. (By Mr. Hatch): At that meeting is it a fact that either Mr. Kan or one of his friends in the company nominated a list of officers and as soon as the nominations were made and before you had a chance to make a nomination, moved to have the nominations closed?

Mr. Karesh: Objected to as immaterial, irrelevant and incompetent; furthermore the question is complex; he spoke about Mr. Kan or one of his friends.

The Court: Who was the friend? Identify him.

Q. (By Mr. Hatch): Do you recall his name?

A. Fred Leong.

Q. Who was it that moved the nomination of certain officers?

A. Mr. Kan.

(Testimony of Ernest Tsang.)

Q. What persons did he nominate?

A. He nominated various men he had on his side of the fence as he called it. Among them at that time were—Among them at that time were Philip Fong, George Chin, Fred Leong and himself.

Q. What did he next move? [103]

A. On his part he moved that the nominations be closed.

Q. You thereupon insisted upon making your own nominations? A. I did.

Q. And as a result of voting your own stock and others you voted in yourself and others?

A. I did.

Mr. Karesh: I move that all of the testimony be stricken as being too remote, what happened in 1940?

The Court: The objection is overruled.

Q. (By Mr. Hatch): Mr. Kan was continued on as the secretary of the corporation until the following year? A. I think that is right.

Q. And then he was removed? A. Yes.

Q. That would be some time in the year 1941?

A. That is correct.

Q. From that time on Mr. Kan was not a corporate officer of the Cathay House, either President, Secretary, Treasurer?

A. He was not?

Q. But he remained on in the employ of the corporation?

A. Yes, and also as one of the directors.

Q. One of its directors? A. Yes.

(Testimony of Ernest Tsang.)

Q. He went into the service on July 23, 1943; in the year or so preceding that time did he have any written contract of employment? [104]

A. No, nor any other time.

Q. Did he ever have any oral contract of employment with the Cathay House, a corporation?

A. He did not.

Q. At the time that he went into the service he was drawing \$500 a month?

A. That is correct.

Q. Now while he was in the service was he continuously in the United States?

A. I believe he was.

Q. And his wife worked at the Cathay House?

A. Yes.

Q. In what capacity?

A. That of bookkeeper.

Q. Did you increase her salary in the light of the fact that her husband was in the service?

A. I did.

Q. You kept her on in that concern until she voluntarily resigned?

A. That is correct.

Q. That was after Mr. Kan's return, I believe?

A. That is right.

Q. In the fall of 1943 did you, upon legal advice, undertake the transfer of this corporate activity into a partnership activity in order to minimize taxes?

A. I did. [105]

Q. Was there any other reason for the change?

A. No.

Q. Were the partnership interests identical with the stock interests?

A. They were.

(Testimony of Ernest Tsang.)

Q. Did you take that matter up with Mrs. Kan before the partnership was effected? A. I did.

Q. Did she have a power of attorney from Mr. Kan to sign his name? A. She did.

Q. Do you know whether she communicated by letter with Mr. Kan on the subject?

A. I don't know.

Q. Did you personally take the proposed articles of partnership over to Sidney Romer as attorney for Mr. and Mrs. Kan and discuss the matter?

A. Not only that but I requested Mrs. Kan to put her initials on the document so that Mr. Romer would know that he was shown the same thing that she had put the initials on.

Q. When you talked to Mr. Romer he approved the set-up? A. That is correct.

Q. And thereupon Mrs. Kan signed her husband's name and her own?

A. That is correct.

Q. And the transfer was made from the corporation to the partnership effective October 1, 1943?

A. That is right. [106]

Q. Up to the time that the corporation was transferred did the corporation at all times have the full number of directors and the usual corporate officers such as president, secretary and treasurer? A. Yes.

Q. During most of the period from its inception to October 1, 1943, those officers and directors were Kan and his associates?

Mr. Karesh: Just what do you mean?

(Testimony of Ernest Tsang.)

Q. (By Mr. Hatch): In the rift between you and Mr. Kan, certain of the stockholders stood with him and certain with you; is that correct?

A. That is correct, but in order to preserve peace and harmony to the best of my ability up to or around the time that Mr. Kan went into the Army I allowed him to have the majority of the directors on the board.

Q. Who were the stockholders in say 1940 who were favorable to and voted with Mr. Kan?

A. They were Philip Fong, George Chin and Fred Leong. Those were all.

Q. (By the Court): How many directors altogether?

A. Seven altogether. I allowed four to be on his side and three on mine.

Q. (By Mr. Hatch): During all of that time did the corporation have an accountant?

A. It did. [107]

Q. A bookkeeper kept a full set of books?

A. Yes.

Q. And deposited all of the receipts in a bank account?

A. Yes, that is correct.

Q. Say in the ear 1940 or 1941 what was the gross volume of business—in the neighborhood of \$100,000?

A. It was \$250,000 gross.

Q. And all of the receipts and disbursements were in the usual course of business duly recorded and reported?

A. That is correct.

(Testimony of Ernest Tsang.)

Q. So far as you know, as president of the corporation did it act in a full corporate capacity and function during the time of your presidency?

A. It did.

Mr. Karesh: You are leading the witness; you are testifying.

The Court: Proceed.

Q. (By Mr. Hatch): Were the receipts and disbursements reported to the stockholders?

A. Yes.

Q. And dividends were paid to the stockholders?

A. Yes.

Q. From time to time? A. Yes.

Q. Turning to the month of December when Mr. Kan returned from service, having been away since July, did he come to see [108] you about getting his job back? A. He did.

Q. Without going into detail what was the gist of your conversation or conversations with him prior to the time of the meeting in my office on January 24th, 1944?

A. As I recall it was on the afternoon I was working——

Q. Don't go into details. What was the gist of the several conversations?

A. I am referring to the first occasion Mr. Kan came into the place in uniform and said "how about a job" and I said "O K, come back to work," and he replied that he would accept the position, to which I agreed. After that time he came to see me and I asked him if he was coming back to work,

(Testimony of Ernest Tsang.)

and he said yes, but there were some matters to discuss, and asked me to have lunch with him over on Fishermen's wharf, which I did, to discuss what he had to say. At that time no one else was present but the two of us, and he said that he would only come back to work on condition that his salary was increased from \$500 to \$750 per month. I told him I did not have the power to increase his salary and the decision would have to come from the majority of the other stockholders, and that the reason I was getting \$750 a month was because I was doing more work than I had done before and it was voted to me by the stockholders. That was the first of the meetings.

Q. Did you have numerous meetings with him before this first [109] meeting in my office?

A. Yes, numerous.

Q. State what this gun episode was?

Mr. Karesh: There is no testimony that there was a gun episode.

The Court: You will have to fix the time and place.

Mr. Hatch: I think the witness can do that.

Mr. Karesh: Furthermore, in fairness to Mr. Kan, who served honorably in the service, I am going to strenuously object to the "gun episode." Counsel has stipulated that Mr. Kan was capable of going back to work and was qualified to perform it, and I do not think that this should be any part of the record.

(Testimony of Ernest Tsang.)

The Court: Counsel will indicate the purpose.

Mr. Hatch: There are two purposes, your Honor. One, to show that he was not a suitable employee although he could have been if he wanted to be. He manifested the fact that he was not a suitable employee. Secondly it goes to the credibility of Mr. Kan who says that he was entitled to be restored to his job. We will show that he tried to force himself upon these people and that he threatened the life of the president of the corporation, which to my mind, if I was trying the facts in the case, might influence me considerably in determining whether his testimony was reliable.

Mr. Karesh: You should have asked Mr. Kan about the gun [110] episode.

Mr. Hatch: I did not have to ask Mr. Kan.

Mr. Karesh: I object to counsel going into this collateral matter.

The Court: The court is prepared to rule. For the limited purpose indicated by counsel I will allow the testimony.

Q. (By Mr. Hatch): In December of 1943 did Mr. Kan bring a gun into the Cathay House? Answer yes or no? A. Yes.

Q. What statement did he make in reference to the gun?

A. Do you want me to use the words that he used?

A. Yes, I do. Don't be so embarrassed.

A. He said he was going to kill the son of a bitch, referring to me.

(Testimony of Ernest Tsang.)

Q. Who did he say that to, or who was present?

A. He said that to my bookkeeper, Lily Tom.

Q. You were present? A. No.

Q. You were not present at the time?

A. No. I was upstairs and the girl came up and told me.

Mr. Karesh: That is highly objectionable.

The Court: The testimony in relation to what was said in his absence will go out.

Q. (By Mr. Hatch): Did anything unusual occur that day?

Mr. Karesh: What day are you indicating?

Q. (By Mr. Hatch): Do you recall the date?

A. It was some time during the middle of December, 1943.

Q. Did Mr. Kan at any subsequent time admit having made the statement of Lily to you?

A. He admitted in the state court that he made such a statement.

Mr. Karesh: Just a minute. This is the most objectionable thing I have ever heard of to say that he admitted it in the state court.

The Court: Let us proceed orderly.

Mr. Karesh: I don't know whether it was said or not in the state court but he has no right to bring that out in this proceeding.

The Court: Did you fix the date?

A. I don't remember the exact date.

Q. (By Mr. Hatch): Did something unusual happen later that day?

A. Just the episode with the gun.

(Testimony of Ernest Tsang.)

Q. You said the girl came upstairs.

A. She came upstairs to warn me.

Q. Did you go downstairs?

A. No, I did not.

Mr. Karesh: I move that that be stricken out as hearsay.

The Court: It may go out.

Q. (By Mr. Hatch): Subsequent to the month of December, namely, on the 24th of January, 1944, there was a meeting in my office?

A. That is correct. [112]

Q. You heard my testimony this morning on that subject? A. I did.

Mr. Hatch: I wonder if in the interest of time I might ask the witness if his testimony would be the same as mine.

Mr. Karesh: That would be absolutely objectionable.

Q. (By Mr. Hatch): At that first meeting the persons present were George Chew, John Kan, yourself and myself, and no one else?

A. That is correct.

Q. Was there any discussion at that meeting as to a contract with John Kan?

A. There absolutely was not.

Q. Was there any discussion about any rights under the GI Bill of Rights?

A. None whatsoever.

Q. Or any federal rights to go back?

A. None whatever.

(Testimony of Ernest Tsang.)

Q. Did Mr. Kan state that he had any right to go back or the right to go back except that he wanted to go back? A. No.

Q. What was the discussion if any about the basis upon which he would return?

A. Are you referring to the first meeting?

Q. Yes.

A. He said he would like to get \$750 per month if possible, but if not he would return for \$500 a month. [113]

Q. What was said by you or George Chew as to the amount you were willing to pay him?

A. Both of us were in agreement as to Mr. Kan having \$500 a month.

Q. What did Mr. Kan say in response to that?

A. He said it was satisfactory with him.

Q. Was there a firm offer at that time by you, that is, positive, unequivocal?

Mr. Karesh: I will object to the form of the question.

Q. (By Mr. Hatch): Did you at that time after the discussion had progressed to the point just indicated by you state to Kan that he could return to work at the Cathay House? A. I did.

Q. Effective when?

A. Any time that he wanted to come back.

Q. At what rate of pay?

A. \$500 a month.

Q. What was said about the term of his tenure?

A. As long as he conducted himself as a good employee and tried to get along with everyone his employment would continue.

(Testimony of Ernest Tsang.)

Q. Did he state that arrangement was agreeable to him personally? A. He said it was.

Q. Did he say that he would return to work?

A. He said that he would.

Q. Did he state any qualification in that regard?

A. He said he wanted to have the approval of Mr. Sidney Romer. [114]

Q. In relation to that meeting what was the discussion about the signing of a document, call it a release or anything else?

A. At that time, you, Mr. Hatch, said that it might be helpful for peace and harmony if he and I each signed some sort of a paper releasing one from the other and agreeing to get along in the future.

Q. Was he asked whether he had any claims of any kind that he wanted to hold out or wanted to assert? A. Definitely he was.

Q. What did he say?

A. He said that he did not have any claim whatsoever.

Q. He did not mention any rights about reemployment? A. He did not.

Q. He made no demand that he be employed?

A. Merely, a request, that is correct.

Q. Was there any discussion at that time of any kind in reference to the necessity or the advisability of assigning his stock or interest to his wife or anybody else?

A. I think it was brought out at that time that it might be advisable if he would assign his stock to his wife.

(Testimony of Ernest Tsang.)

Q. Was it made a condition to his being re-employed?

A. No, it was not made a condition; it was merely stated to him that it would be advisable.

Q. From whose standpoint?

A. From the standpoint of all concerned.

Q. Turning to the next meeting a few days later, that was attended by the same parties together with Mr. Romer? Is that correct? [115]

A. That is correct.

Q. Also in my office? A. That is so.

Q. At that time did Mr. Romer state anything about having a contract?

A. Mr. Romer did so state.

Q. What was his statement?

A. As I recall Mr. Romer said that there should be a contract made for the duration of the war or maybe for three years.

Q. Did he state whether Mr. Kan would return to work if he was not given such a contract?

A. He said that he would certainly advise Mr. Kan not to return to work unless there was that contract.

Q. Did Mr. Kan state that was his viewpoint in view of advice of his counsel? A. He did.

Q. What did he say?

A. He said that he was in accord with his counsel.

Q. There was practically nothing else discussed? A. That is correct.

(Testimony of Ernest Tsang.)

Q. Did you state that so far as you were concerned you were unwilling to make any such concession as to give him a written contract for an extended period of time? A. I did.

Q. Was there any discussion in that meeting about the necessity [116] of his assigning his stock?

A. No.

Q. Was there any discussion at that meeting about the amount which Mr. Kan wanted or would be paid if he got the contract?

A. Yes, the sum of \$500 per month.

Q. Following that meeting did you have one or more discussions with Mr. Kan in the absence of these other parties?

A. Yes; all of them unpleasant.

Q. (By Mr. Karesh): Tell us what you mean.

A. It was very unpleasant for me; he would come in and make threats and use foul language.

Q. (By Mr. Hatch): Did he at any time following the meeting of January 24 offer to return to work without the prerequisite stated by Mr. Romer in that second meeting, namely, that he have this contract? A. He did not.

Q. The discussion in *these* subsequent meeting was concerning whether you would sell out to him or he would sell out to you?

A. Yes, we did discuss that.

Q. As you said you were unable to get anywhere on that? A. Yes.

Q. He wanted you to sell out to him, a minority stockholder, is that correct?

(Testimony of Ernest Tsang.)

A. On one of the occasions he placed such a high price on his \$1100 investment that I could not begin to buy him out. He wanted \$35000 for his interest. [117]

Q. Is it correct to state that at no time following the two meetings in my office did Mr. Kan ever state or indicate to you that he would go back to work at the Cathay House for the sum of \$500 a month?

A. That is correct.

Q. And the same question in relation to the sum of \$750 a month?

A. That is correct.

Q. And the same question in relation to any sum whatsoever?

A. That is right.

Q. And the same question in relation to his willingness to go back to work without a written contract for a minimum period of three years?

A. That is correct.

Q. Is it true that you have never withdrawn the offer—put it this way: Is it true that you have never withdrawn or indicated to Mr. Kan or his attorneys a withdrawal of the offer that was made in my office on January 20 to take him back?

A. That is correct.

Q. I will ask you if at the time of these meetings in my office or immediately thereafter Mr. Kan indicated to you that he would go back to work on a basis of \$500 a month without a written contract for an extended period would you have accepted him and re-employed him?

A. I would have.

Q. Following the meetings did you file a suit against John Kan for declaratory relief? [118]

A. I did.

(Testimony of Ernest Tsang.)

Q. And endeavor to bring to a head his claim?

A. That is correct.

Q. As to whatever rights he might assert?

A. Yes.

Q. You have prosecuted that litigation to a conclusion to the best of your ability?

A. That is correct.

Q. Did you enter a bid at the receivership sale?

A. Yes.

Q. You were proclaimed by the receiver as the highest bidder in competition with Mr. Kan?

A. That is correct.

Q. You bought the physical assets?

A. I did.

Q. And since the date of that sale you have and are still operating the Cathay House as a member of the partnership with two other gentlemen, Frank Fong and Philip Fong?

A. That is correct.

Q. That is the present management?

A. Yes.

Q. Those gentlemen have their money invested in there as well as you?

A. Yes.

Q. They are not dummies for you; they are standing on their own? [119]

A. That is correct.

Q. They put in their money originally in the corporation before the partnership was formed, didn't they?

A. They did.

Q. Essentially the present operation of the partnership is that of the previous partnership with the exception of four people, Mr. and Mrs. Kan and

(Testimony of Ernest Tsang.)

the other two who asked the Superior Court for the liquidation of the business? A. Yes.

The Court: We will take a recess.

Mr. Karesh: I would ask that this witness come back after this wedding.

Q. (By Mr. Hatch): Can you be back?

A. The wedding is at 1:30 in Oakland and I will return soon thereafter.

(A recess was taken until 2 p.m.) [120]

Afternoon Session—2:00 P.M.

Mr. Hatch: I understand the cross-examination of Mr. Tsang will be resumed when he gets back to court.

At this time the defendant offers in evidence certain documents. These are records that I had certified at noon. The first is the complaint for accounting and dissolution of partnership and for a receiver, entitled "John Kan, Helen Kan, George Chin, and Fred Leong, Plaintiffs, vs. Ernest Tsang, et al.," filed in the Superior Court of the State of California in and for the City and County of San Francisco, on February 13, 1946, and numbered 349,840. All of these documents that I am offering are certified copies of originals on file with the County Clerk in that proceeding.

Mr. Karesh: Objected to as immaterial, irrelevant, and incompetent.

The Court: What is the purpose of the offer?

Mr. Hatch: I have an affirmative defense pending.

This is in connection with the receivership. My contention in the argument I have already made to the court is that Mr. Tsang cannot be legally and morally held upon this judgment in view of the receivership, the fact that the claim here presented should have been against the receiver, and that such claim has been waived deliberately by the plaintiff in the action. If Mr. Tsang is held for any judgment from the partnership, I wish to say that the partnership is beyond the control of Mr. Tsang through and at the instance of the plaintiff; and that at his very instance the court over there prescribed the time within which claims were to be filed, and Mr. Kan has waived his claim against the partnership.

Mr. Karesh: The complaint speaks for itself, your Honor; we are suing Ernest Tsang, General Partner, and he is liable.

The Court: For the limited purpose of the offer I will allow it, subject to a motion to strike and over your objection.

(Complaint for accounting and dissolution of partnership and for receiver is marked Defendants' Exhibit A, in evidence.)

Mr. Hatch: The next document I offer is the order appointing a receiver, filed on June 3, 1946, appointing Charles T. Butterworth receiver of the assets and business of the Cathay House.

Mr. Karesh: Our objection will go to all of these documents.

Mr. Hatch: It is so understood.

The Court: It may be admitted.

(Order appointing receiver is marked Defendants' Exhibit B in evidence.)

Mr. Hatch: The next document is entitled, "Interlocutory judgment of dissolution of partnership," filed August 8, 1946, reciting that it is pursuant to stipulation of the parties in open court, and including in the decree. "It is hereby [122] Ordered, Adjudged and Decreed as and for an interlocutory judgment, that the partnership known as 'The Cathay House be and the same is hereby dissolved.'"

The Court: It may be admitted and marked.

(Interlocutory judgment of dissolution of partnership is marked Defendant's Exhibit C in evidence.)

Mr. Hatch: The next document in the same case is entitled, "Order for sale," dated and filed August 8, 1946, ordering the receiver to sell the assets and to return the receipts of the same to court.

The Court: It may be admitted and marked.

(Order for sale was marked Defendants' Exhibit D in evidence.)

Mr. Hatch: Next a document entitled, "Order fixing time to file claims," which is dated and filed August 8, 1946, and provides that all claims be filed with the Clerk of the court on or before August 20, 1946; that if claim is not filed within such time and in such manner it will be excluded from considera-

tion and debarred from assertion against the receiver in this matter, the partnership known as The Cathay House, the partners and the assets thereof."

The Court: It may be admitted and marked.

(Order fixing time to file claims was marked Defendants' Exhibit E in evidence.)

Mr. Hatch: The next document is entitled "Receiver's bill [123] of sale executed on August 30, 1946, by the receiver and filed in court on September 13, 1946, reciting that the highest bid in open court was the bid of Ernest Tsang, for \$25,100, which had been accepted as the highest bid, and pursuant to which the physical assets of the partnership were sold to Ernest Tsang for that sum.

The Court: It may be admitted and marked.

(Receiver's bill of sale was marked Defendants' Exhibit F in evidence.)

Mr. Hatch: Next I have not a certified copy, because for some reason or other the original is not in the County Clerk's file; I have had some difficulty collecting the files, because the case is still pending in Judge Foley's court; he is away on a vacation. This is an order for partial distribution.

Mr. Karesh: I will stipulate that you may use the copy.

Mr. Hatch: By stipulation, it was ordered in the month of October, 1946, that \$97,000 of money on hand with the receiver be distributed pro rata amongst the partners, out of which Mr. Kan received \$10,000, and his wife, Helen Kan, received \$1,000.

Mr. Karesh: How much did Mr. Tsang get?

Mr. Hatch: Mr. Tsang got \$53,000.

The Court: It may be admitted and marked.

(Order for disbursement of funds is marked Defendants' Exhibit G in evidence.)

Mr. Hatch: The next document, Claim of John Kan, is not [124] certified for the reason it was given to the receiver instead of filed with the court; the copy is a true copy on the stationery of Mr. Romer and his associates representing John Kan.

I call your Honor's attention to provision No. 3 of this claim which was filed, as your Honor can see, under that order that provided that they file within a time or they were forever disbarred in connection with this business, and, mind you, all of these proceedings are under the stipulation of the parties.

No. 3 reads:

"Amounts claimed in cross-complaint in Action No. 333,586, now pending and undetermined in the District Court of Appeal of the State of California, in the First Appellate District and itemized in the cross-complaint on file in said action as follows:

(a) For loss of wages \$7870.

(b) For damages for fraud \$25,000.

(c) For costs of suit, estimated at \$250."

I would like that to be received in evidence. Mr. Romer testified that he thought a claim was filed in connection with this pending action, and I think

that upon examination of that document he will find that it was filed in the action which was tried before Judge Deasy. Is that correct, Mr. Romer?

Mr. Romer: I am not certain what was included in this particular claim, other than from your reading it.

Mr. Hatch: I can state to the court that no other claim [125] but that was filed with the receiver.

The Court: Is that satisfactory?

Mr. Karesh: If he says so I will accept the statement. My objection is still made as to it.

The Court: It may be admitted and marked.

(Claim of John Kan was marked Defendants' Exhibit H in evidence.)

Mr. Hatch: I now wish to offer in connection with the plea of *res adjudicata* a document which was received by the court at the time that we were pre-trying the affirmative defense; the document was received in evidence on May 27, 1946, and marked Defendants' Exhibit A, and I would suggest it now be assigned a new number.

Mr. Karesh: We ask that this be not received. Your Honor has already held that the plea of *res adjudicate* is not available here.

The Court: When did I decide that?

Mr. Karesh: Your Honor may recollect that originally Mr. Scholz was here——

The Court: The record will disclose.

Mr. Karesh: Yes, I am sure the record will disclose that we asked the court to vacate the order holding the receiver a party, and your Honor entered such an order.

Mr. Hatch: You are technically correct.

Mr. Karesh: There was a judgment of decree that it was [126] *res adjudicata*.

Mr. Hatch: It was never signed.

Mr. Karesh: We filed this motion, your Honor, on July 9, 1947. "Notice of motion to vacate order and for reconsideration. Notice is hereby given that on Monday, July 14, 1947, the Petitioner will move the above-entitled court for its order vacating its order made July 7, 1947, dismissing this action on the ground that it is *res adjudicata*.

"Said motion will be based upon all the papers, records and files in this action, and upon the ground that the court erred in making the above order holding that because a suit had been entered in the California State Court between Ernest Tsang, Plaintiff, vs. John Kan, Defendant, and the judgment therein having become final, that the action before this court has been finally adjudicated."

Thereafter, on the 14th, the order to dismiss proceedings was vacated.

The Court: No matter what happened before, and what had gone on before, they are not precluded now from offering any defense they have.

Mr. Karesh: We will object on the ground that the plea of *res adjudicata* is not a proper plea and should not be received in evidence. I will object to the offer of the document.

The Court: What is the purpose of the offer?

Mr. Hatch: On the affirmative defense of *res adjudicata*. [127]

The Court: The objection is overruled. It may be admitted and marked.

(Exhibits on plea of res adjudicata and plea of another action pending were marked Defendants' Exhibit I, in evidence.)

Mr. Karesh: Will you tell what documents there are?

The Court: He has offered them in evidence, and I have allowed them in subject to your motion to strike and over your objection.

Mr. Hatch: I now request counsel and Mr. Kan to produce that certain document, a copy of which appears to be contained on page 51 of the deposition of John Kan, and begins with the caption, "Meeting at Hatch's Office January 20."

Mr. Karesh: Now, I am very sorry that counsel handled this case in the manner he did for his own sake, because there was an opportunity for discovery that he could have made long before this proceeding and had Mr. Kan produce the document. I do not know anything about the document. I asked Mr. Romer a few weeks ago and he asked Mr. Kan—maybe Mr. Romer can answer that question.

Mr. Romer: Mr. Kan does not appear to have it.

Mr. Hatch: I am establishing as your Honor may well see as a predicate for the production of secondary evidence. [128]

ROBERT E. HATCH

Direct Examination

(Resumed)

The Witness: I think I concluded with what was said at the two meetings. Following that time Mr. Kan was in my office on January 3, 1945, and January 11, 1945, shortly less than one year after the two meetings that I have discussed.

At that time I interrogated Mr. Kan, who was under oath, as to what he recalled of the substance of what was said and done at those two meetings. His reply was——

Mr. Karesh: Your Honor, counsel should have asked Mr. Kan while he was on the stand, "did you not testify in my office on whatever date it was if he had said so and so." Having failed to do so he cannot impeach my witness. That is elementary.

Mr. Hatch: I do not think that is the law, but if your Honor rules that it is, I would ask to recall Mr. Kan and go over this.

The Court: I think it would be best.

Mr. Hatch: I will ask then that Mr. Kan take the stand.

The Court: Let the record show that he is called back. [129]

JOHN J. KAN

recalled.

Recross-Examination

By Mr. Hatch:

Q. Mr. Kan, do you recall being in my office two times, on or about January 3, 1945, and January

(Testimony of John J. Kan.)

11, 1945, when your deposition was being taken in the case of Tsang vs. Kan?

A. I don't remember the exact dates, but I do remember that in January I did go to your office for the deposition.

Q. And at that time you were accompanied by your counsel, I believe, Judge Ames and Mr. Romer?

A. I believe so.

Q. You were sworn as a witness in this matter to tell the truth, the whole truth, and nothing but the truth by Alfred D. Martin, a notary public?

A. I remember that very distinctly.

Q. Thereupon you were interrogated by counsel, Judge Ames and myself, is that correct?

A. That is correct.

Q. I will ask you if at that time and place you were asked the following questions and gave the following answers——

Mr. Karesh: Show him the transcript.

The Court: Let him read them.

Mr. Hatch: Beginning on page 22.

Mr. Karesh: You understand he is going to cross-examine you, he is going to ask you as to matters in that transcript. [130]

Mr. Hatch: I wonder if a better way would not be for counsel to read the questions and answers. I will read the questions and answers if the court will permit.

Mr. Karesh: Is that Kan's deposition?

Mr. Hatch: Yes, and if there is anything in

(Testimony of John J. Kan.)

here that is wrong you will stop me. Otherwise, I will assume it is correct:

“Q. You remember the occasion of the meeting in this office on January 20th?

“A. I do.

“Q. The general subject was the possibility of your returning to work, wasn't it?

“A. It wasn't the possibility. It was the promise under which I was to return to work.

“Q. All right. Will you state your version at this time of what position you took then, as to what you wanted or thought you were entitled to, or anything of that sort?

“A. It wasn't what I would want; it was what I was promised.

“Q. All right. Will you state what you then said as to what you had been promised.

“A. Yes. I told Mr. Tsang that I was discharged from the army, and I didn't think there was any possibility for me having to go back into the army; and naturally, I wanted to go back to my former position.

“Q. Do you recall whether at that time you were asked whether [131] you claimed you had any agreement that entitled you to do so?

“A. Yes. Mr. Tsang and I discussed that very thoroughly at the luncheon.

“Q. You don't follow me. I am asking you now as to what you said on January 20th here in my presence, as to whether you had any agreement or on what basis you claimed the right to return to

(Testimony of John J. Kan.)

work—whether it was something said by the employer or otherwise?

“A. I don’t remember. I think you are the one that conducted most of the discussion.

“Q. Would you say or would you deny that at that time you stated in the meeting that you did not claim there had been any agreement to take you back?

“A. I don’t think I made any statement of that kind.

“Q. Do you remember what position Mr. Chew took in reference to your coming back?

“A. Well, Mr. Chew was a sort of a business adviser to Mr. Tsang, as Mr. Tsang told me; and Mr. Chew’s attitude before we come into your office——

“Q. Not before you came in. What position did he take in our mutual presence in reference to whether you had the right to come back or whether you should come back; and if so, what terms?

“A. I don’t know. Mr. Tsang has always referred to Chew as his business adviser; and I just took it for granted that [132] he came in here in the capacity of a business adviser.

“Q. All right. After he came in here in whatever capacity it was, what, if anything, did Chew say as to his disposition toward your return?

“Mr. Ames: Do I understand here today that Mr. Chew would have had anything to say about it?

“Mr. Hatch: That was not the point of the question. It is a statement that was made in the

(Testimony of John J. Kan.)

presence of this litigant; and I want to know what it was; and what response, if any, Mr. Kan made in regard to it.

“A. I don’t remember.

“Mr. Ames: If he remembers.

“A. I don’t remember.

“Mr. Ames: He doesn’t remember anything like that.

“Q. (By Mr. Hatch): You don’t know what position Mr. Chew took about your return?

“A. No, not his; but I remember what he told me when we left the office.

“Q. Well, all right. Tell me what he said after you left the office.

“A. Well, Mr. Chew said out in the street——

“Q. This was in the presence of Mr. Tsang?

“A. No, Mr. Chew and myself.

“Q. All right.

“A. He said he was glad to see the matter thrashed out; and he said he didn’t see any necessity [133] for any controversy; and he referred to the success of the business; also complimented me upon the good work I had done in building up the business; and he felt that there should be no friction between Tsang and myself.

“Q. Anything else?

“A. That is all I can remember of that is of importance.

“Q. What position did Mr. Tsang take in the meeting?

(Testimony of John J. Kan.)

“Mr. Ames: You mean what did Mr. Tsang say?

“Mr. Hatch: Yes.

“Mr. Ames (Continuing): In the meeting? You can't state what position he took; but what did he say out loud.

“A. I can't remember what he said.

“Q. (By Mr. Hatch): How did the meeting end?

“A. It ended with—You are referring to this meeting that Mr. Romer wasn't present at?

“Q. Yes, that is correct.

“A. I think it ended by mutual agreement between us that I should have Mr. Romer present at the next meeting. I believe that was the idea.

“Q. Was there at that meeting any expression of either a willingness to take you back or a refusal to take you back?

“Mr. Romer: May I ask that be clarified so that Mr. Kan will know which of the two you are referring to?

“Mr. Hatch: I am referring to the January 20th meeting. [134]

“Q. In other words, how far along did the meeting get before it was postponed until we could talk to Mr. Romer?

“A. Well, I believe we reached the point where you discussed the—my reemployment; and you stated that at no time did Mr. Tsang consider re-employing me.

(Testimony of John J. Kan.)

“Q. I seem to have some difficulty. Maybe you don’t understand what I am trying to reach; and maybe you don’t recall the detail. Let’s see if I can get at it this way: What did you have in your mind as an impression at the time that the meeting adjourned on January 20th, as to whether you were going to get a job at the Cathay House or not?

“Mr. Ames: Well, I haven’t made any objections, Mr. Hatch, to the form of your questions, although I think they are entirely incompetent questions. It isn’t a question of what a man has in his mind; it is a question of who said what.

“Mr. Hatch: That is what I want.

“Mr. Ames: And what was done.

“Mr. Hatch: I agree with that wholeheartedly; but Mr. Kan hasn’t told us yet just what occurred; and I thought maybe an expression of his viewpoint would reflect what he heard.

“Mr. Ames: Why don’t you——

“Mr. Hatch: I was trying to get at it that way.

“Mr. Ames: Why don’t you ask the direct question, [135] did they tell him they would take him back at that meeting?

“Q. (By Mr. Hatch): All right. Let’s answer that question.

“Q. (By Mr. Ames): Did they tell you they would take you back into the employment of the Cathay House, Mr. Kan?

“A. I don’t think there was anything definite about taking me back.

(Testimony of John J. Kan.)

“Q. (By Mr. Hatch): All right, Now——

“A. It was all very vague.

“Q. We are coming closer to the point. That is what I am trying to develop. What was said and by whom at that time that indicated to you there was a possibility of your returning to work?

“A. Well, I have to refer to my notes on that. I can’t——

“Q. To help yourself?

“A. I don’t have them with me now.

“Q. (By Mr. Ames): Did you make any notes?

“A. Yes.

“Q. Shortly after the time?

“A. Yes. I have some notes at home, and I didn’t bring them along.”

Q. Is that about right up to that point?

A. I can’t remember all that word for word. It is very complicated.

The Court: Is there anything in what he has stated that you have in mind now that would change your testimony? [136]

A. No, I think that is pretty close.

Q. (By Mr. Hatch): Then you went home and came back two days later with a document, didn’t you?

Mr. Karesh: I don’t see any impeachment so far. He has not impeached him at all.

Mr. Hatch: I show you your deposition at page 51, is that a copy of the document that you went home and wrote out after the first meeting?

A. I believe that is the memorandum.

(Testimony of John J. Kan.)

Mr. Karesh: Are you going to offer that in evidence?

Mr. Hatch: Yes.

Mr. Karesh: I will object to that, he cannot offer that memorandum.

The Court: The objection will be overruled.

Mr. Karesh: I don't see how it could be introduced in evidence.

The Court: He showed it to him and he said that is the memorandum. Proceed.

Q. (By Mr. Hatch): The situation is now, so we understand it correctly, Mr. Kan, that after the meeting in my office on January 20th, either the same day or just a few hours afterwards, you went home and wrote out a memorandum of the meeting of January 20th?

A. Will you repeat that?

Q. You had a meeting in my office on January 20, 1944, and we [137] discussed the matter at length. Do you recall that?

A. Yes.

Q. You had no attorney present?

A. That is right.

Q. So after you left the office, either that day or the next day at home, you wrote out a memorandum of what occurred at that meeting in order that you would have a record of it?

A. No, it was not for a record. I don't know whether I wrote down everything that occurred, or not, it was just for myself.

The Court: You read that memorandum?

A. Yes.

(Testimony of John J. Kan.)

Q. Is that the memorandum? A. Yes.

Mr. Hatch: Was it written on a typewriter, or in pencil? A. It was scribbled in pencil.

Mr. Hatch: Now, I wish to read that document, your Honor.

The Court: Proceed.

Mr. Karesh: My objection is going to all of this.

The Court: I think the record discloses that. The objection is overruled. Proceed.

Mr. Hatch: "Meeting at Hatch's office, Jan. 20.

"Hatch: Refers to Ernie's entry into corporation as minor Stockholder and gaining control of majority of stock on account of my not having Capital, etc. That there were some mistakes in forming the corporation—in that we had [138] no permit to issue stock. That partnership was not Ernie's original idea, since I had discussed it with him—and that when it was changed to partnership apparently had my approval even though done in my absence.

"Said it would be difficult for me to come back and work on employee basis without some dissatisfaction (1) Suggests agreement on employee basis. (2) That since limited partner cannot be active, I place my shares in my wife's name. (3) Asks about duties—whether managerial or other.

"Ernie: Replies that 'just go back to work'.

"Chew: Refers to salary.

"Ernie: Refers to discussion between he and I.

"Hatch: Says salary was between Ernie and myself.

(Testimony of John J. Kan.)

“I said wanted my attorney to be present, and there was no use drawing up contract until I thought it over in regard to the new angles thrown upon the matter as explained by him.”

Q. Now, in this same deposition you were interrogated as to your recollection of the second meeting, that is the one of January 24, were you not?

A. Yes.

Q. Now, beginning on page 16—and I might ask Mr. Kan, if you find anything wrong about this call my attention to it. Page 36 of the deposition, beginning with line 14:

“Mr. Ames: How much longer are you going to take? [139]

“Mr. Hatch: Oh, a few minutes.

“Q. Do you have any recollection of what transpired at the January 24th meeting other than what you have testified to? A. No, I don’t.”

Mr. Karesh: I think this is a highly improper method of attempting to impeach a witness.

The Court: I am responsible for the conduct of this trial.

Mr. Karesh: For him to read several pages of transcript at once?

Mr. Hatch: You are wrong in your statement. The memorandum is embodied in one page.

Mr. Karesh: That counsel read, one page?

The Court: Yes, that counsel read, the memorandum.

(Testimony of John J. Kan.)

Mr. Karesh: I do not mean the memorandum. I am referring to prior to that time.

The Court: In any event, proceed.

Mr. Karesh: Will you tell me on what page you started reading the testimony so I can follow you?

The Court: He read it.

Mr. Karesh: He didn't tell me the page. What page did he start with? I have some difficulty in looking at the transcript in following him.

Mr. Hatch: I began on page 22, line 4, and I read the deposition down to where he concluded the first conversation of [140] January 20th, and it was subsequent to that testimony he had no recollection.

Mr. Karesh: No recollection of what?

Mr. Hatch: He didn't have a recollection of anything at the time. I am not trying to make him out a liar, I am merely saying that his recollection is very unsatisfactory.

The Court: It is time for recess.

(Recess.)

Mr. Hatch: Counsel wanted to know where I was reading from the transcript. I read from page 22 line 4 to and including line 3 on page 27. I will now read from page 31, line 3:

"Q. All right. When he came here on January 20th, isn't it a fact that Mr. Tsang said to you in the presence of Mr. Chew and myself that he was agreeable to your returning to work at the Cathay House?

"A. Well, I don't remember. I will have to—I will have to refer to those notes that I made."

(Testimony of John J. Kan.)

On the same page, 31, beginning at line 18:

“Q. Is it your position at this time that without your notes, you are unable to recall with accuracy what was said at the meeting of January 20th?

“Mr. Ames: I think that is what he has said several times, Mr. Hatch, already.

“A. That is right [141]

“Mr. Hatch: Q. All right. That is what I understood him to say. He now answers ‘That is right’.”—that he does not recollect what was said without getting his notes. That was in answer to the question:

“Is it your position at this time that without your notes, you are unable to recall with accuracy what was said at the meeting of January 20th?

“Mr. Ames: I think that is what he has said several times, Mr. Hatch, already.”

And the answer by the witness is, “That is right.”

Now the question:

“How about the meeting of January 24th in this office? Do you have any recollection of that without studying your notes to refresh your recollection?

“A. (Addressing counsel for the defendant): Have we notes on that?

“Mr. Romer: Here is a memorandum.”

Then resuming at page 32, line 11:

“Mr. Hatch: Q. The notes you speak of concerning the January 20th meeting were about when?

“A. Made the same evening.

“Q. In your handwriting? A. Yes.

“Q. About how many pages?

“A. Oh, two pages, I suppose. [142]

(Testimony of John J. Kan.)

“Q. Now, I have asked you about the meeting on January 24th. Do you recall coming to this office about 3:00 o'clock in the afternoon of that day with Mr. Romer and Tsang and Mr. Chew being present, together with myself?

“A. Yes, I remember that.

“Q. Are you able to testify as to anything that occurred or was said during that meeting without refreshing your recollection?

“A. Well, we came here with the impression that we were going to sign a contract of agreement—a contract of employment—rather. Correction.

“Q. That was your impression? A. Yes.

“Q. Generally speaking, what were the terms of that contract you expected to sign?

“A. Oh, I think reference was made by you only to my signing a release of all claims against Mr. Tsang.

“Q. Before you go to that, we are talking about a contract of employment, and you said when you came on January 24th, you expected to sign such contract?

“A. I expected a discussion to be on the contract of employment.

“Q. A discussion on the contract of employment? A. Yes.

“Q. What did you have in mind then as to the terms of that [143] contract? What did you expect that contract to contain?

“A. I expected to get a contract of employment

(Testimony of John J. Kan.)

to contain a clause of employment for three years at the Cathay House.

“Q. At what salary?

“A. At \$500.00 a month.

“Q. Did you have any discussion on that subject with either Chew or Tsang or myself after the meeting of January 20th and before the meeting of January 24th, except the conversation with Chew outside the office which you have already testified to?

“A. No, there was no conversation between us in that period.

“Q. As I understand it, after the January 20th meeting, you went home that night and made some notes; and between that and the 24th, you discussed the matter with Mr. Romer, and then you came over here on the 24th, is that correct?

“A. That is right.

“Q. Would you deny at this time that on January 20th, I asked you whether there had ever been any agreement to return you to any particular job at any particular salary after your discharge from the army?

“A. Will you say that again?

“Mr. Hatch: Read it.

“(Question read by reporter.)

“A. No, I don't remember.

“Mr. Hatch: Q. On January 20th did you express either [144] a desire or a demand during the meeting that you have a contract for a specified period of time?

(Testimony of John J. Kan.)

“A. Why, I told you, Mr. Hatch, I couldn’t remember exactly what went on in that meeting.

“Q. Well——

“A. And I can’t make a statement on that until I see my notes.

“Q. You don’t recall that one way or the other at this time?

“A. Not at this time, no.

“Q. Let us put it this way: In the month of December of 1943, did you at any time express a willingness to return to Cathay House and go to work pending a decision as to what your rate of pay would be? A. I did.

“Q. You did agree to do that? A. Yes.

“Q. And who was to make the decision as to the rate of pay?

“A. Mr. Tsang was to see Mr. Chew and get his approval.

“Q. And did you agree that you would be bound by either their decision or that you would resolve your own opinion on the subject? Do you understand the question?

“A. Will you say that again?

“Q. Yes. Did you agree that you would accept whatever wage they decided you should have?

“Mr. Ames: Q. In other words, did you say so to [145] anybody?

“Mr. Hatch: That is right.

“A. Well, here is the way the discussion went on. As I told you before, we discussed whether the salary would be \$500.00 a month or \$750.00 a month;

(Testimony of John J. Kan.)

and Mr. Tsang said that he would see Mr. Chew about it; and it was my suggestion that I come back to work pending their decision as to whether the salary would be \$500.00 or \$750.00 a month.

“Mr. Hatch: The range was between those two limits, so far as you were concerned?”

“A. Yes.

“Q. Without refreshing your recollection from any notes, can you remember at this time whether on January 20th I asked you if you had any claims against the Cathay House or Mr. Tsang other than the right to go back to work? Do you remember any discussion of that? A. I don’t.

“Q. Do you remember any discussion about the desirability of getting a release from you at that time of any claims that you might assert?”

“A. Yes, I remember your discussing a release—my signing of a release of all claims against Ernest Tsang. For what reason, I don’t know.

“Q. Do you not recall that I asked you whether you had any claims except the right to go back to work, you [146] said no?”

“A. I don’t remember that.”

Mr. Karesh: I think that this is a highly improper method of attempting to impeach the witness. He has been permitted to run along—how many pages did you read? Would you say twelve?

Mr. Hatch: I would say twelve.

Mr. Karesh: This is highly improper, your Honor. The only proper method would be to ask the

(Testimony of John J. Kan.)

question, and if he said he didn't remember give him a chance to explain why he didn't remember.

The Court: You can take him on cross-examination and develop that fact. Proceed.

Mr. Hatch: "Q. Do you not recall that I asked you whether you had any claims except the right to go back to work, and you said no?

"A. I don't remember that.

"Q. You don't remember that. Do you deny that at that meeting you said you didn't have any other claims, but you would not sign anything in writing to that effect?

"A. No, I don't remember that I—I remember saying that I didn't want to sign any release.

"Q. All right. Do you remember the expression being used by me at that time that bygones should be left as bygones, something to that effect?

"A. I think you said something to that effect.

"Mr. Ames: How much longer are you going to take?

"Mr. Hatch: Oh, a few minutes. [147]

"Q. Do you have any recollection of what transpired at the January 24th meeting other than what you have testified to?

"A. No, I don't.

"Q. Did you make any notes of that meeting yourself? A. No, I didn't.

"Q. Do you remember what position you took or demands you made, if any, at that meeting?

"A. I remember I came in here expecting to discuss the contract of employment.

(Testimony of John J. Kan.)

“Q. But you don’t remember of any demands or claims that you made? A. No.

“Q. As a matter of fact, since you left the service you never have returned to work at the Cathay House? A. No.

“Q. After the meeting of January 24th, was there any discussion between you and Tsang or Chew or any others connected with the Cathay House about your returning?

“A. Yes, there was.

“Q. One or more conversations?

“A. One or more conversations? About a half a dozen conversations.

“Q. In the absence of Mr. Romer and myself, I presume?

“A. Yes. Between Mr. Tsang and myself. [148]

“Q. What was the substance of those conversations?

“A. Well, there was one conversation I remember that Mr. Tsang discussed with me the contract of employment; and I told him that I couldn’t sign a release of all claims against him, because, naturally, I would be forfeiting my rights.

“Q. So——

“A. Whereupon we entered into a discussion about buying and selling—either one buying the other out.

“Q. Did you ever get to the point of agreeing on what your salary would be if you should return, and I am talking now after these later conversations?

“A. Yes, of course, several times. I went back to

(Testimony of John J. Kan.)

see Mr. Tsang several times, and it was just continued procrastination. One time it was one thing and one time it was another thing. I couldn't get to first base with him.

"Q. You said you never could get to first base. Did you ever reach with him any understanding as to what pay you would receive if you were taken back?

"A. Yes, I told him I was perfectly agreeable to go back at \$500.00 a month several times.

"Q. And he never agreed to that? A. No.

"Q. Is that correct?

"A. Well, he would say that he would, and then he said that he would—he would say that would be all right. The [149] next time you would go back, and he would have another change of attitude. He always seemed to be kind of off on a limb."

Then at page 42, beginning at line 17, this being when Mr. Kan came back a week following for a continuance of the deposition:

"Q. Mr. Kan, your counsel has handed me a typewritten copy of one page of what purports to be your notes of the meeting in this office on January 20th of last year. Have you a copy of that before you? A. Yes, I have.

"Q. The original of this document was in your handwriting, was it? A. Yes, it was.

"Q. What you have before you is a correct transcription of those notes? A. It is.

"Q. Those are all the notes that you have of any

(Testimony of John J. Kan.)

meeting or meetings on this subject either in this office or with Mr. Tsang?

“A. Yes, those are all the notes I have.

“Q. Then if you don’t mind, I would like when we adjourn to have that copy that you have before you handed to the reporter, and let him copy it as an exhibit to the deposition.

“A. I have no objection.” [150]

Do you want me to read on Mr. Karesh?

Mr. Karesh: Read on.

Mr. Hatch: All right.

“Q. All right. Do you have now any independent recollection of what occurred or was said at either the January 20th or the January 24th meeting in this office other than that to which you have testified, and other than that which is set forth in this memorandum of yours?

“A. Yes. As I recall now, I did not put down the reference to the release of all claims which you referred to on January 20th. I have this listed as one, two and three; and there is no place here where there is a reference to your discussion of the release of all claims which you said was one of the—one of the things that you wanted me to do—wanted me to sign a release of all claims; also have an agreement—a partnership agreement to place the shares in my wife’s name.

“Q. Other than those things you have now mentioned, are there any other exceptions to the longer question I asked you?

“A. No, I don’t believe so.

(Testimony of John J. Kan.)

“Q. Were there any written documents submitted to you in this office at the time of either of these meetings? A. No.

“Q. You spoke of a release. What is your recollection as [151] to when and where, if any, and if at any place any writing was ever submitted to you?

“A. Why, I don’t think the thing was discussed very thoroughly.

“Q. When you say ‘the thing,’ you mean the release?

“A. I mean the writing, the release of all claims or of any partnership agreement, for that was not explained to me; but I had the impression that the agreement of partnership was somewhat of a contract of employment, the terms to be discussed when my lawyer would be present.

“Q. All right. Now, you stated just now what your impression was; and I asked you along that line when we were here before on this deposition, and I will ask you again: What was your impression or state of mind at the time that you left this office on January 20th, as to what was next to be done? What was the next move, in other words?

“A. In the first place, I wanted to have my attorney present; and since he wasn’t able to attend that meeting, and there was an entirely new and different angle thrown upon the picture from the time Tsang discussed it with me before we came here, I wanted to think the thing over and discuss it with my attorney; and I did not certainly want to sign anything unless I knew what I was signing; and my

(Testimony of John J. Kan.)

impression was that since Tsang had a contract of employment, that I would receive a similiar arrangement and—— [152]

“Q. Well, was anything said by anybody at the January 20th meeting that you were to have a contract, or was that your impression only? Let me withdraw that question.”

Mr. Karesh: Go on.

Mr. Hatch: There is a colloquy between counsel.

Mr. Karesh: I am not interested in the colloquy.

Mr. Hatch: I will turn to page 48, line 22 and read:

“Q. Coming back to the next meeting on January 24th, do you or do you not recall in your presence, your attorney, Mr. Romer, saying that—or discussing the desirability on your part of having a contract in writing?

“A. I wouldn’t put it that way, because, both Mr. Romer and I were—we were both of the impression that we came here on the 24th for the purpose of discussing the contract of employment.

“Q. When you came on the 24th and before you came into the meeting, what was your idea as to the duration to be specified in any contract?

“A. As I told you before, I expected to have a contract for the same period of time as Mr. Tsang did.

“Q. You say that was your expectation. Now, it was based solely upon your conclusions and not upon anything that was said by anybody present?

“A. Absolutely not. My own conclusion.

(Testimony of John J. Kan.)

“Q. And there was nothing said by anybody that you were to [153] have a contract the same as Tsang’s?

“A. No, as I told you, it was just the impression that I had.

“Q. Do you remember at the second meeting, the one of January 24th, Mr. Romer, discussing with me the purported length of the contract, whether it be for the duration of the war or for three years or for something else of that sort?

“A. I don’t remember the details of that discussion.

“Q. All right. I have one other thing to ask you: At any time did you attempt to get a lease to the Cathay House from the Chinese people or firm who had the lease on the building? Did you attempt to get a lease from them, or any of them, in your own name for the premises occupied by the Cathay House? A. No, I don’t remember.”

Mr. Karesh: That certainly has nothing to do with it, getting a lease.

Mr. Hatch: It certainly has. It as a substantial variance in the testimony of this witness.

Mr. Karesh: I will withdraw the objection.

Mr. Hatch: He testified yesterday that he did not, and away back he did not remember.

Mr. Karesh: He did not say that.

Mr. Hatch: That is all for the deposition, your Honor. I have no further questions. [154]

(Testimony of John J. Kan.)

Further Recross-Examination

By Mr. Karesh:

Q. At the time you made that statement in answer to Mr. Hatch's question at the deposition about you didn't remember, can you explain why you didn't remember?

A. There were several reasons for that. As I recall, I never had any experience in litigation before. My attorney had informed me previously that this was more or less a fishing expedition on Mr. Hatch's part, and he said, "Well, you don't have to answer anything if you don't want to." I did not put importance on the deposition, therefore when the second one was taken I probably didn't remember a lot of things I did not want to remember. Might I explain the memorandum?

Q. Go ahead.

A. That memorandum was for the sole purpose of informing Mr. Romer of what had happened, and that did not happen at that meeting. Mr. Hatch's questions were so involved and going from one point to another he had me all confused, I didn't know really what it was about.

Q. Isn't the reason you did not put down about the release because that had been already indicated to Mr. Romer?

A. That is right, that it was foremost in my mind. I knew I might have to go into court some day and I felt that I would tell my story in court then. I didn't know what a deposition was, frankly, I did not place any importance on it.

(Testimony of John J. Kan.)

Q. Isn't it true that your understanding about the contract [155] was that you were to receive a contract if there was to be a release granted by you?

A. That is what I understood.

Q. Otherwise, you were willing to go to work without a contract if no conditions were imposed upon you, isn't that right?

A. That is right. In fact, Mr. Romer told us at the January 24th meeting, he said, "Let us not have anybody sign any release."

Mr. Hatch: This is something that transpired between Mr. Romer and someone else?

A. They were having a discussion.

The Court: Where?

A. At Mr. Hatch's office.

Mr. Hatch: Was that in the presence and hearing of Mr. Hatch? A. Yes.

The Court: You may relate it.

A. Mr. Romer suggested at the January 24th meeting that I go back to work without signing or receiving any papers or anything of the sort, and I do not think it was agreed to.

Mr. Karesh: This is probably rebuttal but I could recall Mr. Kan a little out of order.

The Court: Before you go forward, get through with this witness.

Mr. Karesh: I will call him back in rebuttal.

The Court: I will try to dispose of this case as best I can.

Mr. Hatch: I have one further matter to testify to. [156]

ROBERT E. HATCH

Direct Examination

(Resumed)

The Witness: I wish to further testify there was no discussion at either of the meetings of January 20 or 24 about the necessity of Mr. Kan transferring his stock interest to his wife. I am certain of that because the corporation was not involved in the subjects under discussion; it was not operating the business. So far as assigning his interest in the partnership to his wife or to us it was unnecessary, the rule of law being that a limited partner may participate in the operation of the business, but if he does do so he exposes himself to the same liability as the general partner. There is no inhibition against it, therefore there would be no different set up. That is the direct examination.

Cross-Examination

By Mr. Karesh:

Q. Now, Mr. Hatch, isn't it true that Mr. Tsang would have to hire Mr. Kan?

A. What do you mean?

Q. You advised him that he did not have to, didn't you?

A. That bears absolutely no resemblance to the fact. I advised Mr. Tsang and Mr. Kan to go back and take a trial and try to get along, and undoubtedly they would have done so had there not been a misunderstanding between the parties. If you want me to explain I will; other than that I will leave it to argument. I thought they were both high class

(Testimony of Robert E. Hatch.)

and intelligent persons, and there was no reason why they could not get along, [157] and I not being much older than either of them, I still took a paternal viewpoint in discussing it with them, and I still think that was right, that they should forget these clashes and quarrels of partners and they could have gone on and made a lot of money, and could have worked it out, but that was not what happened, and it was not because of my advice or Mr. Tsang's advice that it did not happen.

Q. Now, Mr. Hatch, you spoke of some writing that you wanted Mr. Kan to sign, some release; what kind of writing was it that you wanted him to sign?

A. I tried to describe it before; it was merely something in writing in an informal fashion that the parties would agree to let bygones by bygones.

Q. Did you want Mr. Tsang to sign it too?

A. Yes, it was a mutual release as previously mentioned.

Q. Did you have the memorandum prepared when you asked them to sign it? A. No.

Q. But it was in the nature of a mutual release?

A. It was in the nature of a release of any claims actual or fancied; each one assured me that he had no claims against the other. And I figured by doing this that they would not bring up their past unpleasantness.

Q. One of the features of the release was that Mr. Kan was to OK the transfer of the corporation

(Testimony of Robert E. Hatch.)

to the partnership, was it not? That was one of the features was it not? [158]

A. No, definitely not.

Q. What did you mean by suggesting bygones be bygones?

A. As I tried to explain it to these gentlemen at the meeting of January 20, where there was not any legal basis involved, Kan had started and promoted the business; he considered himself to be the father of the organization. However due to some business difficulties they had reached a point where he realized he was in a minority position; he no longer had control of the business. He had publicized himself among the Chinese section and throughout the city that he was the Cathay House, and it was very natural that he should feel unhappy where he was not the main man of the Cathay House.

Q. That happened, that he was not the main man, because they went into the bankruptcy court?

A. Quite the contrary.

The Court: Financial interest.

A. Financial interest. The one thing was when they were getting behind and it needed money to meet the payroll and pay the bills and pay the rent—they were in arrears in the rent for many months; and when times were bad Mr. Tsang was the one that came forward and put the money to carry it along. Either Mr. Kan could not or would not, I don't know, it doesn't make any difference. The result was that from a major position Kan was in an inferior position to the majority stockholders and

(Testimony of Robert E. Hatch.)

it was difficult for him to divorce that high sentiment from a practical viewpoint based upon his legal position. [159] And it was my opinion that that alone was what caused the friction between these gentlemen. I don't think there was anything radically wrong with either, but Kan could not adjust himself to his new position, and as a result there had been bitterness and hostility develop between these two men who were confined to the one room in a restaurant. That was all reviewed with Kan when he came back and was in my office, and I said if you try to get along you can only do it by forgetting what has gone on in the past, and to be sure that that is firmly impressed in your mind I suggest that you write out a little memorandum and each of you sign it and forget everything which previously happened.

Q. (By Mr. Karesh): Mr. Hatch, why was it that you asked him to sign something?

A. It was just a suggestion.

Q. Why did you ask him to sign a document letting bygones by bygones if it was not a release of all claims? A. I gave you my best answer.

The Court: It would be well for the court to inquire at this time, what claims have you in mind.

Mr. Karesh: Mr. Kan was to waive all his rights?

The Court: What were his rights.

Mr. Karesh: One would be a right to have his old employment.

The Court: That was not discussed.

(Testimony of Robert E. Hatch.)

Mr. Karesh: Whether it was discussed or not his signature [160] on a release would have had the effect of tolling his rights under the Selective Service Act.

The Court: I am not sure about that.

Mr. Karesh: To ask a man to sign a release and waive his rights under the Selective Service?

The Court: Under the circumstances the important thing to keep in mind the conduct of the parties and their actions, and as far as the testimony discloses there was not anything disclosed in relation to the release.

Mr. Karesh: That is the conflict.

The Court: I have in mind only what the testimony discloses. However, proceed.

The Witness: I would like to complete my last answer. There was some discussion. Had there been any claim brought to my attention that Kan had a right under the Selective Service Act the whole thing would have been approached from a different standpoint. I did not know of it; I don't think Mr. Kan did; if he did he never communicated it to us. The first I knew there was any possibility of such a right was when they filed the cross-complaint in the state court before Judge Deasy and asserted rights under the Selective Service Act. I had never heard of it before. I had asked Mr. Kan if he had any claim and he said no. If he had told me he had that would have covered that.

The Court: When was the suit filed in the Superior Court by Mr. Tsang? [161]

(Testimony of Robert E. Hatch.)

A. I can give you the exact date. The complaint is there as an exhibit. It was filed October 21, 1944.

Q. (By Mr. Karesh): Is it your testimony that you had no knowledge of Mr. Kan's claim under his Selective Service rights prior to the filing of that suit?

A. The meeting was in January; that would be approximately correct. If there was anything intervening it was only the discussion I had with you and I don't know when that was.

Q. Didn't we make a demand upon you or request upon you to have Mr. Tsang rehire Mr. Kan under the Selective Service Act, and didn't you write us a letter, which is dated March 27, 1944? This is six months prior to October. A. Yes.

Q. That is your letter to me, isn't it, Mr. Hatch?

A. This is my letter to Mr. Karesh; it is dated March 27, 1944. I still testify that it was during the period, without knowing the exact date, but after the time of the meeting of January 20, that I first heard that there was a possible Selective Service federal statute; whether it was from reading your letter to me or the complaint that was filed by Mr. Romer, which were not far apart, I would not be able to say at this time.

The Court: Read the letter.

Mr. Karesh: I would like to offer the letter in evidence. It is dated March 27, 1944. [162]

(Testimony of Robert E. Hatch.)

“Mr. Joseph Karesh

Assistant United States Attorney

Postoffice Building

San Francisco

Dear Sir:

Re John Kan

“I agreed to endeavor to communicate to you the decision of my client on this matter on or before this date. As I told you, we have filed a proceeding under 2084 of the California Code of Civil Procedure, to perpetuate the testimony of Mr. Kan. The court has set that matter for two p.m. on March 31, 1944.

“It is our intention to examine him at length at that time in reference to any claims that Mr. Tsang or the corporation made any agreement or commitment to Mr. Kan, and if so, the precise nature thereof.

“In the meantime I do not see how we can intelligently take a definite position in regard to the claims of Mr. Kan, which so far are quite uncertain. Only tentatively can I say that we dispute there was any agreement to take him back, but none the less we did offer him a suitable position and he has failed to accept it. As previously explained to you, there are many features connected with the transaction that make it impractical and unwise to reemploy the gentleman, regardless of which a bona fide offer to take him back was made. Beyond all this, the reemployment of him at any such figure as

(Testimony of Robert E. Hatch.)

he mentioned is uneconomical for there is no need of anyone at such a salary. [163]

“In summary we do not feel that we are able to give you a complete and definite answer at this moment, but will be immediately upon the completion of his deposition. We would also be happy to supply you with a copy of the same, should you so desire.

Respectfully yours,

ROBERT E. HATCH.”

(The letter is marked Plaintiff’s Exhibit 7.)

The Court: What in that letter has any relation to the subject matter?

Mr. Karesh: That he was in communication with the United States Attorney’s office with respect to the claim of Mr. Kan under the Selective Service Act.

The Court: I mean the subject matter dealt with there. You were inquiring about his knowledge.

Mr. Karesh: He says that up to October, 1944, when this suit was filed in the Superior Court of the City and County of San Francisco, he had no knowledge of Mr. Kan having any rights under the Selective Service Act. This is correspondence that he had with the United States Attorney’s office. I will offer more letters that show that he had communication with the United States Attorney’s office in regard to this matter.

Q. Are these your communications to this office

(Testimony of Robert E. Hatch.)

dated March 31, April 7, March 21, 1944, April 14, 1944, and April 20, 1944? A. Yes. [164]

Q. These are in relation to negotiations between yourself and our office arising under the Selective Service Act? A. That is correct.

Mr. Karesh: I would like to offer in evidence only one of these letters, the letter of April 20, 1944, to show that this man was refused employment.

Q. You wrote this letter to us, didn't you?

A. It does not bear my signature but I am sure it was written by me.

Mr. Karesh: It is on the letterhead of Robert E. Hatch. We will offer it in evidence and I would like to read it.

“April 20, 1944

“Hon. Joseph Karesh,

Asst. U. S. Attorney

Postoffice Bldg.

San Francisco

Dear Sir:

By this time you no doubt have received the copy of Mr. Kan's deposition. You will note that he has refused to answer all pertinent questions.

My clients have given this matter considerable thought and take the position that they are under no obligation to Mr. Kan. Without attempting to specify all of their reasons, the following can be enumerated.

1. There was no contract of employment. Kan was an employee whose employment was

(Testimony of Robert E. Hatch.)

subject to termination at the pleasure of his employer, without explanation. Were he re-employed [165] it obviously would be on the same basis, and if discharged within an hour after his reemployment he would have no complaint.

2. There is no opening for him, and the business does not justify the employment of a person at anywheres near the figure he has demanded.

3. His refusal to answer these questions together with his previous manifestations, confirms the belief that Mr. Kan could not and would not be a suitable employee but rather that his presence and activities at the Cathay House would be inimical to the interests of the employer. You will please understand that over a period of years there was a great deal of friction, the attitude and acts of Mr. Kan were highly objectionable to the others, and that this has all been eliminated by the withdrawal of Mr. Kan.

In our opinion, it would be unconscionable to force this gentleman upon the firm as an employee, something that would have no chance of working out and would result to the prejudice of Mr. Kan as well as the others interested in the success of this enterprise.

Respectfully,

ROBERT E. HATCH.

(Testimony of Robert E. Hatch.)

PS. In addition to the foregoing, an offer of reemployment actually was made to Mr. Kan, which he declined because they would not give him a written guaranty of its continuance for the duration of the war."

(The letter is marked Plaintiff's Exhibit 8.)

Q. (By Mr. Karesh): You say that there was a great deal of friction between Mr. Kan and Mr. Tsang prior to the entrance of Mr. Kan into the service.

A. I say I was told that by Mr. Tsang; in fact it came to me as a great surprise because all the time I had been around the Cathay House as a patron they seemed to be very friendly. It was a good act apparently. It was quite a shock to me when Mr. Tsang came and said Mr. Kan wants to come back and I am afraid to take him in; that is the first time I knew there had been any friction.

Q. You never personally witnessed any friction or any words between Mr. Kan and Mr. Tsang, did you? At this meeting in your office was there any friction?

A. Let me answer that this way if I may; none before Kan went in the army; none upon the two occasions in my office. In the first meeting they were friendly and in the second meeting there was no conversation between the two. The meeting only lasted a few minutes. My knowledge of their unfriendliness comes from what I learned from Mr. Tsang and from a little talk about this gun incident.

(Testimony of Robert E. Hatch.)

Q. The answer is not responsive. I asked you whether or not there was any friction in your office?

The Court: Let him answer.

A. The manner in which Mr. Kan proceeded after he was offered the job—— [167]

Mr. Karesh: I will ask that that be stricken; he was never offered a job back.

The Court: He said under oath that he was.

A. Additionally the minutes of the corporation, which came to my attention literally shows that there was unbelievable turmoil between the parties; there were cat and dog fights. I didn't know but I heard of it later.

Q. (By Mr. Karesh): Do you recognize Mr. Tsang's handwriting on this picture?

A. That is Mr. Tsang's and his dog. It is addressed "To Auntie Helen and Uncle Johnny. Sincerely Laddie, age 2 months."

Q. Do you know to who he is referring by "Auntie Helen and Uncle Johnny"?

A. I should say Auntie Helen to be Mrs. Kan.

Q. And Uncle Johnny?

A. I would presume that to be John Kan.

Q. What is the date on that?

A. May 4, 1943, before he went into the service.

Q. Does that reflect any ill feeling?

A. It certainly does not.

Mr. Karesh: I will offer the picture in evidence.

A. I will go a lot farther and that while I do not want to extol Mr. Tsang's qualities, I must say he has made a most extraordinary effort to get

(Testimony of Robert E. Hatch.)

along with Mr. Kan despite the way that Mr. Kan treated him. [168]

Q. As a matter of fact you know that Mr. Tsang was interested in throwing Mr. Kan out of the business because he was jealous of him?

A. That bears no resemblance to the truth. As a matter of fact when Mr. Tsang controlled the company and after Mr. Kan had tried to throw him out, Mr. Tsang permitted Mr. Kan to remain until he went into the service. And when he went into the service he personally undertook to take care of her by employing Mrs. Kan and increasing her wages.

Q. How much?

A. I don't recall but I know she did get more than she did before, and he looked after his interest, kept the business up and when Kan came back, despite the fact that he had had all of this trouble with him he was willing to take him back and give him a chance.

Mr. Karesh: I will ask that the picture be received in evidence.

The Court: It may be admitted and marked.

(The picture is marked Plaintiff's Exhibit 9.)

Q. (By Mr. Karesh): Isn't it true that Mr. Tsang and his people put up \$5300 to acquire the stock?

A. That is my understanding.

Q. As a result of that \$5300 Tsang has profited some \$150,000?

(Testimony of Robert E. Hatch.)

A. Well, I would not think the figures run that high. Whatever profit there was inured proportionately to Mr. Kan and Mr. Tsang in proportion to the amount of their investments. [169]

Q. Isn't it true that it was the personality of Mr. Kan that built up the business?

A. Well, Mr. Kan and several others; not exactly Mr. Kan. What really built up the business was the war coming along.

Q. Is it your testimony that the business lost money the first year that Mr. Tsang was in the business?

A. I don't think I have very definite information—I never had occasion to examine it. I only took their statements on that. I believe that probably the first year, being a new affair, a novel enterprise, like a race track it had a big day on opening day and a bad day the second day. I think that after the novelty wore off the business deteriorated for a period of time.

Q. Isn't it true, and I show you the minutes of a stockholders' meeting that the first year they declared a dividend of 30c on the stock?

A. I have no information on that.

Mr. Karesh: That is all.

The Court: It is now time for adjournment.

(Thereupon an adjournment was taken until tomorrow, September 12, 1947, at 10 a.m.)

Friday, September 12, 1947

ERNEST TSANG

Direct Examination

(Resumed)

By Mr. Hatch:

Q. Mr. Tsang, at the time that Mr. Kan went into the army what salary were you drawing?

A. \$500 a month.

Q. Sometime shortly thereafter that was raised to \$750 a month?

A. That is correct.

Q. Tell us how that came about?

A. The increase in my salary came about after we changed from the corporation to a partnership. At a meeting of all stockholders who were then in San Francisco, the change over was discussed and the matter of what I had to do, and Mr. George Chew who was then a stockholder suggested that inasmuch as I was doing my own work and the work that John Kan had been doing, he suggested that I also take his salary of \$500; I did not want to do that. So I was given \$750 instead of \$500.

Q. That is the manner in which you were raised to \$750?

A. That is correct.

Q. You took on an additional job on the floor as assistant head waiter to do that part of the work which Mr. Kan had been doing previously?

A. Yes, in part.

Q. In part?

A. Yes. [171]

Q. There were other duties of Mr. Kan that you performed; in other words the work that you took over, was that one part of the work that Mr. Kan had been doing?

(Testimony of Ernest Tsang.)

A. That was part of the work that he had been doing.

Q. I don't know whether this is particularly material but inasmuch as it has been brought up, was Mrs. Kan working at the restaurant before Kan went into the service? A. She was.

Q. What was her work?

A. She helped seat the customers and when we had a waiting list she took the names of those customers and they would be called in turn.

Q. You did not serve breakfast?

A. We did not serve breakfast.

Q. Just two meals a day? A. Yes.

Q. She just worked at the time of those two meals? A. That is correct.

Q. What was she receiving in salary before Mr. Kan left?

A. I think she was receiving in the neighborhood of \$65 a month for several hours work in the evening.

Q. And as soon as Mr. Kan went into service what did you do about her wages?

A. Her salary was then increased to \$175 a month.

Q. She did the same work that she had done before for \$65? [172]

A. That is correct.

Q. Was that in view of the fact that Mr. Kan was in the service and his income was reduced?

A. That was what I had in mind.

(Testimony of Ernest Tsang.)

Q. You were the one that raised her salary?

A. That is correct.

Mr. Hatch: No further questions.

Cross-Examination

By Mr. Karesh:

Q. Mr. Tsang, it was Mr. Kan who got you into the business of the Cathay House?

A. He was the one I spoke to when I came up to the Cathay House.

Q. You say it was Mr. Kan who spoke to you. Did you seek out Mr. Kan or did he seek you out?

A. One of the partners had sought me out.

Q. Who was he?

A. His name was Ben, he sought me out.

Q. I am talking about Kan. Did he seek you out? A. No.

Q. You went up to see Mr. Kan at the Cathay House? A. That is right.

Q. With respect to buying an interest in the business, is that right? A. Yes.

Q. What did you tell Mr. Kan.

A. Well, I think it was in the afternoon we had a talk, I don't remember what it was and I said I was willing to invest in the [173] firm.

Q. You did not say you were willing to invest, you said you wanted to invest, didn't you?

A. No, because it was a few weeks before I even decided to invest, after auditing the books; I didn't want to invest before I did that.

(Testimony of Ernest Tsang.)

Q. You were an interpreter with the government?

A. I was both an interpreter and senior clerk.

Q. How much money did you invest in this business?

A. I think it was \$2,000.

Q. \$2,000?

A. Let me think a minute. I don't recall the exact amount.

Q. I think somebody said \$5,000.

Mr. Hatch: That was over a period of time?

A. I think it was \$2,000.

Q. (By Mr. Karesh): What did you get for the \$2,000?

A. Two thousand shares of stock.

Q. Did you go to work for the company then?

A. Yes, I did.

Q. What was your salary?

A. \$50 a month.

Q. What was Mr. Kan's salary?

A. I am not sure; I think it was \$125.

Q. What were your duties in relation to Mr. Kan's?

A. I worked on the floor seating people.

Q. How many hours of the day were you there?

A. In the beginning I worked from five until closing time; at [174] that time we were open until two o'clock.

Q. How long did you get \$50 a month?

A. I received \$50 a month up until a month less than I left my employment.

Q. Then what salary did you receive?

(Testimony of Ernest Tsang.)

A. I think I was raised to a par with Mr. Kan, as I recall.

Q. Who suggested that your salary be raised to the same as Mr. Kan's? A. I don't recall.

Q. It was Mr. Kan that got your salary increased, wasn't it? A. I don't think so.

Q. Who was it?

A. I don't recall who it was but it was not him.

Q. Are you sure it was not Mr. Kan?

A. I think it was not.

Q. On what do you base that?

A. Because at that time there was a lot of trouble between the partners in the firm at that time, and the matter of hours and work done on the premises by various people was discussed and the matter of my salary came up, and that is all I recall about it.

Q. Mr. Kan never opposed your raise in salary, did he? A. I don't recall that he did.

Q. When was your next increase in salary?

A. I think it was some time after that that both Mr. Kan and I [175] were increased at the same time to \$300 a month.

Q. In other words when you got \$300 a month Mr. Kan got \$300 a month, is that right?

A. That is right.

Q. You never had any restaurant experience prior to your going into the Cathay House, did you?

A. Oh, yes, quite a few years.

Q. Where?

A. I don't know as I recall the number of the

(Testimony of Ernest Tsang.)

building they were in business many years ago but I helped establish a restaurant.

Q. How long ago was that prior to your buying in the Cathay House?

A. Well, I would say 16 or 18 years ago.

Q. It was 16 or 18 years prior to your entrance into the business; you had had no experience in the business during that time?

A. Oh, yes; cooking was always my hobby.

Q. But you were not in a restaurant?

A. Not during the years I was with the Immigration.

Q. You got \$300 a month and Kan got \$300 a month. When was the next raise?

A. I don't remember when, but both of us were increased to \$500.

Q. A month? A. Yes, a month.

Q. So you were in there for a few months and got \$50 a month, then you got \$125, and both of you went to \$300 and both went up to \$500? [176]

A. That is correct; the difference in our salaries in the beginning was called to the attention of the stockholders because at that time I had \$2,000 invested in contrast to Mr. Kan's \$1,000.

Q. Of course Mr. Kan had started the business.

A. I do not dispute that.

Q. You were saying something about a stockholders meeting.

A. Yes; I recall that I mentioned the disparity between our salaries, and added to my investment

(Testimony of Ernest Tsang.)

in the firm, I thought I was entitled to a larger return.

Q. Then you got it?

A. Yes, I got it, but not because any of the stockholders or Mr. Kan wanted to give it to me, because at no time did I get anything from him or from any of the partners unless I fought for it, because when I went in the firm every one was there before I arrived.

Q. Well, you got your \$300 a month.

A. I got it.

Q. You got your \$500 a month?

A. I certainly did.

Q. You got your \$750 a month, didn't you?

A. Yes.

Q. You got the business transferred from a corporation to a partnership when Mr. Kan was in the army?

A. That is right, for the advantage of all concerned. [177]

Q. Didn't Mrs. Kan tell you her husband was in the service and would you not wait until he came back so that he could discuss the matter of the transfer from the corporation to the partnership.

A. There was no mention of Mr. Kan ever coming back by Mrs. Kan.

Q. Tell us what you said to Mrs. Kan about the transfer of the corporation to the partnership and what she said to you?

A. I explained to Mrs. Kan that the transfer was made solely for the purpose of saving money

(Testimony of Ernest Tsang.)

for the firm, and she informed me that Mr. Kan had told her not to sign any papers unless he was present or his attorney, Mr. Romer, had first perused the papers, and in the alternative was, in the absence of Mr. Kan, to have his attorneys go over the papers, which was done.

Q. Don't you know Mr. Romer had advised Mrs. Tsang not to sign the papers until her husband came back? A. I did not.

Q. It is your testimony that Mrs. Kan never told you at any time to wait if possible until her husband came back?

A. To my recollection she did not.

Q. But you are not positive, are you?

A. I am fairly positive.

Q. Your testimony is Mrs. Kan never told you to wait until her husband came back?

The Court: Doesn't the record disclose that she got the advice of counsel? [178]

Mr. Karesh: But if your Honor please, might I recall this is where a woman asks——

The Court: I am not concerned about that. I want to get what the record discloses. Did she have legal advice before the transfer was made?

Mr. Karesh: If your Honor please, where a woman asks——

The Court: I am not asking that. I am asking does the record disclose she had legal advice before the transfer was made.

Mr. Karesh: She had legal advice.

(Testimony of Ernest Tsang.)

The Court: That is all I wanted to know. Proceed.

Mr. Karesh: I am entitled to ask him now——

The Court: You are entitled to ask him what the record disclosed at that time.

Mr. Karesh: I did not say she had not legal advice.

The Court: Who was her attorney?

Mr. Karesh: Mr. Romer.

The Court: Proceed with the case.

Mr. Karesh: Might I respectfully ask the question again as to whether Mrs. Kan did not ask you to wait until her husband came back from the service.

A. I don't recall that she ever did ask me to wait.

Q. Then did all of the stockholders vote you \$750 a month?

A. With the exception of Mrs. Kan.

Q. Who was present at that meeting when you were voted the \$750 a month? [179]

A. Mr. Philip Fong——

Q. Your friend?

A. He is now my friend. Fred Leong, Mrs. Kan, George Chew, George Chin; all the stockholders with the exception of Mr. Kan.

Q. Did Mrs. Kan oppose your raise?

A. She did not oppose it but she informed me that inasmuch as her husband was not here she thought it would be better if she did not because

(Testimony of Ernest Tsang.)

there were already enough signatures to effect my increase in salary.

Q. Of course you had control of the stock at that time any way, didn't you?

A. I did, but at no time did I exercise it.

Mr. Hatch: So that there will be no mistake about it this is a partnership, not a corporation.

Mr. Karesh: I mean a controlling interest.

Mr. Hatch: That would be argumentative.

Q. (By Mr. Karesh): How many shares did you have, that is of record?

Mr. Hatch: He had more than one half of the partnership interest.

Q. (By Mr. Karesh): What about Mr. Yuke?

A. Yuke had 100 shares assigned to him; during the time the business was incorporated I assigned the stock to him so that he would have enough to be a director on the board.

Q. In other words that was your stock that you gave him? [180]

A. I assigned it over to him.

Q. Without any consideration at all?

A. You mean any cash consideration?

Q. Yes. A. That is correct.

Q. What about Mrs. Lorene Carter?

A. The same situation existed there.

Q. You gave her 100 shares?

A. I did not give her any shares. As a matter of record it is mine.

Q. You mean they were dummies for you?

(Testimony of Ernest Tsang.)

A. I would not call them dummies, but we still had to get enough directors.

Q. Didn't you have enough directors for the board? A. No.

Q. Did you put them on so that you could vote Mr. Kan out of the business?

A. That was not the case when I could have voted Mr. Kan out of the business; with those two persons holding stock in the names, and I did not vote him out.

Q. Who signed the contract of employment at \$750 a month?

A. Those that I have just mentioned.

Q. Tell me how much did you invest in this business? A. A total of \$5500.

Q. How much have you taken out?

A. I have taken out quite a bit. [181]

Q. How much?

A. I don't recall; over all these years I don't recall how much. I took it out in proportion to my investment.

Q. I did not ask you that. I am asking how much you took out of that business?

Mr. Hatch: That is immaterial. It has nothing to do with the case.

The Court: The objection is sustained.

Q. (By Mr. Karesh): How often did the partners meet?

A. You are referring to the partnership?

Q. The partners of the partnership?

(Testimony of Ernest Tsang.)

A. I don't think we had any regular schedule of meeting.

Q. In fact you hardly met at all; you just run the whole business, didn't you?

A. That is correct.

Q. Tell me, you and Mr. Kan were very friendly before he went into the service, weren't you?

A. I wouldn't say so.

Q. What would you say?

A. I would not say we were friendly except on the surface.

Q. Mr. Kan was very able and held the title of general manager of the Cathay House, did he not?

A. There never was the title of general manager.

Q. What was he?

A. The corporation never did accord that title nor did the partnership. [182]

Q. You and he were general co-managers?

A. I never called him general manager. We were co-managers.

Q. What made you angry at Mr. Kan, what did he do prior to going into the service that made you angry?

A. It got to a point where we were angry at each other.

Q. What about this picture that you gave him? I want to show it to you. Now on May 4, 1943, you were very friendly with him, weren't you? You gave him this picture? A. Yes.

Q. Weren't you friendly then?

A. On the surface I was.

(Testimony of Ernest Tsang.)

Q. Why didn't you discharge him? You had control of the partnership, why didn't you discharge him?

A. You want to know why I didn't discharge him?

Q. Yes.

A. Mr. Kan was in there ahead of me, and I had known him for a number of years, and I did not want to discharge him because we were living in a small community, and I did not want to discharge him.

Q. This picture was just a fake picture?

A. I would not say it was a fake picture.

Mr. Karesh: I would like to show this picture to your Honor.

The Court: I am not interested in the picture. This case does not depend on the merits of the picture. Proceed with the case.

Mr. Karesh: May I make this observation?

The Court: Proceed and get through with the witness. We have spent enough time on this case.

Mr. Karesh: Your Honor has made the observation that you did not consider the picture important.

The Court: I do not.

Mr. Karesh: May I tell you why I consider it important?

The Court: Proceed with your examination.

Q. (By Mr. Karesh) At the time Mr. Kan went into the service you were very friendly to him, weren't you?

A. No.

Q. Didn't you give him a party and didn't you

(Testimony of Ernest Tsang.)

tell him when he came back from the war everything would be all right and he would be back on his job? Didn't you tell him that before he went into the service?

A. I don't recall what I told him, the exact words. I gave him a parting gift.

Q. What?

A. I gave him one of the combat swords.

Q. Didn't you tell him everything would be the same when he got back?

A. I told him not to worry.

Q. You told him not to worry.

A. Yes, and he had no occasion to worry.

Q. At all times when you and Mr. Kan were in the place your names were used on the matches and on the advertising.

A. Oh no, not at all times. [184]

Q. Here are some matches; do you recognize these.

A. I do.

Q. Do you recognize these match boxes?

A. I do.

Q. They have the names Kan and Tsang on them?

A. That does not indicate they were on there at all times.

Q. Even as early as 1941 there was an article in the paper mentioning the names of Kan and Tsang. Do you recognize that article?

A. I recognize that but that does not mean that my name was on everything with his at all times.

(Testimony of Ernest Tsang.)

Q. Would you say the first year you were in business the business lost money?

A. That is a broad statement. The first part of the first year the firm lost money; when I went in the firm I had the biggest investment, and as I recall the firm was around \$15,000 in the hole and the last of the first year the firm began making money.

Q. At the end of the first year you were in there was a dividend of 30 cents on the dollar. Let me show you the records of the stockholders meeting. Look at the September 30, 1940, stockholders meeting and see if you did not make money that first year and the meeting of September 29, 1941. and tell me if you did not make money?

A. We made money every year. [184-a]

Q. As a matter of fact you did not put an extra \$3,000 in there because the business needed money but you put it in there because you wanted to invest in the business?

A. That is a matter of opinion.

Q. Why did you put the extra \$3,000 in?

A. All right, I will tell you; when I went in the firm it was around \$15,000 in the hole and the business had proceeded to a point that the Chinese merchants in Chinatown refused to sell goods to the Cathay House and they even went so far as to print bulletins by the Chinese brokers association—

Q. When was this?

A. Around the time I went into the firm. This association had printed bulletins asking all members to refrain from selling goods to the Cathay

(Testimony of Ernest Tsang.)

House; I knew of that fact when I went in; I also knew the firm was in the hole; but I thought the business could be put on a basis favorable to making money; so I went to the secretary of that association and said to them that I was going into the firm, and his reply to that was that is all I want, I just want to talk to some one in the firm. At that time they were \$15,000 in the hole, and——

Q. That is not what I am speaking about. When you invested the \$3,000 that was not because the firm needed money then but you wanted to buy extra shares of stock?

A. That is not correct.

Q. Tell us what is correct. [185]

Mr. Hatch: At *this* I will make an objection that this is entirely extraneous to the issues in this proceeding and irrelevant.

The Court: I will sustain the objection.

Mr. Karesh: At this time I will offer in evidence the stockholders meeting of September 30, 1940, and the stockholders meeting of September 29, 1941, showing profits and dividends.

The Court: They may be admitted.

(Stockholders Meeting of September 30, 1940, is marked Plaintiff's Exhibit 10 and Stockholders meeting of September 29, 1941, is marked Plaintiff's Exhibit 11.)

Q. (By Mr. Karesh): When Mr. Kan came back from the service when did you first see him?

A. I presume the first day of his return.

Q. When was that?

(Testimony of Ernest Tsang.)

A. I don't recall the date; he has stated for the record what date it was. I do not remember the date.

Q. Was that the day you went from the Cathay House down to Fishermen's Wharf? A. No.

Q. Tell us what happened that first day?

A. As I stated previously, I was working at the cashier's desk, because we had no cashier that day, and I had no inkling Mr. Kan was returning, and all of a sudden he was standing in front of me. [186]

Q. In uniform?

A. In uniform, yes. I shook hands with him and said, "Glad to see you," or words to that effect.

Q. Were you glad to see him?

A. Whether I was or not I showed the glad hand to him, and he said to me, "How about a job," and I said, "O. K., come back any time you are ready," and he looked at me very closely, and pulled out a paper which happened to be his discharge, and I said, "Why didn't you let me know you were coming out or being discharged?" Prior to that I had heard rumors that he was coming out but I didn't know that he was.

Q. So you said you would put him to work?

A. Yes.

Q. Why didn't you put him to work?

A. He wanted two weeks vacation, which was agreeable to me.

Q. Did you tell him it was agreeable?

A. Absolutely.

(Testimony of Ernest Tsang.)

Q. Did you tell him to come to work two weeks from then?

A. He said two weeks vacation and I will come back to work, and I said "O. K."

Q. Then what happened?

A. After this two weeks had elapsed—I don't recall whether I saw Mr. Kan during that period or not, but at the expiration of two weeks he came in.

Q. What did he say? [187]

A. I said, "Are you ready to go to work?" and he said "Yes, but there are a few things we will have to talk over." I said, "Fine," and he said, "Let us have lunch at Fishermen's Wharf and *take* matters over." I was agreeable. I don't recall whether it was that day or the following day or several days later, we met and had lunch at Fishermen's Wharf as Mr. Kan described. After lunch I asked Mr. Kan what he wanted to talk about, if he was ready to come back to work; he told me he wanted to talk about salary of \$750 a month I was getting and thought he was entitled to the same.

Q. What did you say?

A. I explained to him that I was not empowered to raise him to \$750 a month; that the raising from the \$500 to \$750 would have to come from the stockholders; that I was empowered to give him \$500 a month. That was the gist of the conversation.

Q. Then what did he say?

A. He said he wanted \$750 a month.

Q. Go on.

(Testimony of Ernest Tsang.)

A. And if I did not give it to him he would see that I received a lot of bad publicity.

Q. What did you say?

A. Well, I kept myself in check; I did not get mad, tried not to anyway. I told him I was not the one in the firm to talk about this, he would have to talk to the other partners, and inasmuch as Mr. George Chew was the next largest stockholder that he see him. [188]

Q. By the way, the company could very well have afforded to have given him \$750 a month, couldn't it?

Mr. Hatch: I object to that as immaterial.

The Court: Objection sustained.

Mr. Karesh: Might I say——

The Court: The Court has ruled; what they could afford to do is not an issue in this case.

Mr. Karesh: For the sake of the record, may I make my offer of what I am trying to prove. The Selective Service Act says that a man is entitled to his job——

The Court: I know what the Act says. Proceed with the witness.

Q. (By Mr. Karesh): Go ahead; what happened after that?

A. I believe the meeting ended at that point.

Q. Did you take it up with the stockholders about raising it up to \$750?

A. I did not because Mr. Chew was in Los Angeles and would not be back for several days.

Q. Did you ever take it up?

(Testimony of Ernest Tsang.)

A. Several days after that Mr. Kan came in and saw me again.

Q. Did you ever take it up with the stockholders or shareholders? A. You mean all of them?

Q. Yes, at a meeting. Did you ever call a meeting and ask them to consider this matter of \$750 a month? A. I did not.

Q. Can you explain why you did not? [189]

A. Because I felt that the man was entitled to \$500 a month; that is what I was offering him. I also told him that he go back to work at \$500 a month and that it could be decided on later as to the \$750.

Q. Did you tell him that? A. Yes.

Q. You remember you gave a deposition on the 11th of January, 1945, at Mr. Hatch's office, 1320 Mills Tower. A. Yes.

Q. Did you ever say that in your deposition?

A. I don't recall that I was asked that.

Mr. Hatch: It is not only in the testimony but it is in Mr. Kan's deposition to the same effect.

Mr. Karesh: What?

Mr. Hatch: That Mr. Tsang told him to go back to work at \$500 and they would determine what the salary was to be. That is in Mr. Kan's testimony; I read it yesterday.

Mr. Karesh: Did you read it?

Mr. Hatch: Yes. I read it yesterday; do you want me to read it again?

Mr. Karesh: Yes.

The Court: We will take a recess.

(Testimony of Ernest Tsang.)

(After recess.)

Mr. Karesh: All right, Mr. Hatch; you said you had something to read.

Mr. Hatch: This is on page 34 of Mr. Kan's deposition, [190] line 18. These are questions by me:

"Q. Let us put it this way: In the month of December of 1943, did you at any time express a willingness to return to Cathay House and go to work pending a decision as to what your rate of pay would be? A. I did.

"Q. You did agree to that? A. Yes.

"Q. And who was to make the decision as to the rate of pay?

"A. Mr. Tsang was to see Mr. Chew and get his approval.

"Q. And did you agree that you would be bound by either their decision or that you would resolve your own opinion on the subject? Do you understand the question?

"A. Will you say that again?

"Q. Yes. Did you agree that you would accept whatever wage they decided you should have?

"Q. (By Mr. Ames): In other words, did you say so to anybody?

"Mr. Hatch: That is right.

"A. Yes. Well, here is the way the discussion went on. As I told you before, we discussed whether the salary would be \$500 a month or \$750 a month; and Mr. Tsang said that he would see Mr. Chew about it; and it was my

(Testimony of Ernest Tsang.)

suggestion that I come back to work pending their decision as to whether the salary would be \$500 or \$750 a month.

“Mr. Hatch: The range was between those two limits, so far as you were concerned? [191]

“A. Yes.”

I must point out that Kan's testimony is that he made the suggestion that he go back to work and abide by the decision as to whether it was to be \$500 or \$750, and that neither Mr. Chew or Mr. Tsang would make any agreement as to more than \$500 a month. When I indicated that I thought that the testimony had already come in on that it was in response to a question by Mr. Karesh a few minutes ago addressed to Mr. Tsang as to whether he ever so testified. I have read the deposition of Mr. Tsang, and that deposition was taken by Judge Ames, and you will find the question where he asked for the information which Mr. Karesh wanted to know if Mr. Tsang so testified.

Mr. Karesh: And he did not so testify.

Mr. Hatch: No, he did not so testify; neither was he asked any question that would tend to elicit that information.

Mr. Karesh: I will read that into the record. I am referring to the deposition of Ernest Tsang taken in the office of Robert Hatch, 1320 Mills Tower, on the 11th of January, 1945. I will turn now to page 18, line 1. You will concede that this is what he said there?

Mr. Hatch: Yes.

(Testimony of Ernest Tsang.)

“Q. (By Mr. Karesh): Very well. We will have to go into this definitely, then. You had a conversation with Kan about December 15, 1943, is that right? [192] A. That’s correct.

“Q. Where did that conversation take place?

“A. It took place at the restaurant called *Gishermen’s Grotto*.

“Q. Who was present besides you and Kan?

“A. No one else.

“Q. And did Kan at that time demand to be restored to his former position?

“A. He didn’t demand it. We merely discussed it.

“Q. Well——

“A. And prior to that——

“Q. We won’t quibble with words about it. Did he ask then to be restored to his position?

“A. I had informed him before that that he would be.

“Q. Please answer the question. Did he ask to be restored to his position in the Cathay House?

“A. No, he did not. He did not have to.

“Q. He did not. Well, the answer is no, then, is that right? A. That’s correct.

“Q. What is the next date that you have there?”

Preceding this, going back to page 17, it shows that Mr. Tsang is a stenographer and had some notes. That is correct?

(Testimony of Ernest Tsang.)

A. That is correct. They were dates of various meetings I had with Mr. Kan.

Mr. Karesh: Continuing on page 18:

“Q. What is the next date that you have there? A. January 2nd, 1944. [193]

“Q. And does that refer to a conversation with Kan? A. It does.

“Q. Where did that conversation take place?

“A. In the office of the Cathay House.

“Q. Who was present besides you and Kan?

“A. No one else.

“Q. At that time, did he request to be restored to his former position?

“A. At that time, he—or I will answer the question yes; but he also demanded \$750 a month salary.

“Q. I see. He asked to be restored on the same salary basis that you were getting, is that right? A. That's correct.

“Q. And what was your answer to that?

“A. I informed him, as I had on previous occasions, that I had no power to grant him \$750 a month, because that salary was granted me by the majority of the stockholders.

“Q. Is that the answer that you gave him at that time? A. That's correct.”

Mr. Hatch: We will stipulate that those answers were given at that time.

Q. (By Mr. Karesh): Did you take it up with

(Testimony of Ernest Tsang.)

the other partners at a meeting to see whether he would get \$750 a month?

A. I took it up with George Chew.

Q. Did you take it up with the other members of the partnership?

A. Not the other members individually. [194]

Q. Then when you told him that \$750 a month could be given only by the action of the other partners you were not telling him the truth, were you?

A. I took it up with Mr. Chew.

Q. What about the other partners? Who were the other partners then?

A. Fred Leong, Mr. Chin, Philip Fong, Mrs. Kan and partners of record Mrs. Carter and Mr. Yuke.

Q. Did you take it up with Mrs. Carter?

A. No, it was not necessary.

Q. Why wasn't it necessary?

A. It was not necessary because it was deemed her stock was mine.

Q. Did you take it up with Mr. Yuke?

A. I did not take it up with him: I mentioned it to him.

Q. Why did you tell Mr. Kan that you would have to take it up with the other partners?

A. I could not give him the increase that he wanted unless everyone was in agreement with it.

Q. What did Mr. Chew say?

A. Mr. Chew was not in agreement.

Q. Did you say you were in agreement?

(Testimony of Ernest Tsang.)

A. I had indicated how I felt to Kan right along; I could not give him \$750.

Q. You had a right to vote on whether he would get a salary of \$750? A. I did. [195]

Q. Did you vote on it? A. I did not.

Q. Did you tell Mr. Chew that you were for it or against it? A. I told him neither way.

Q. Did Mr. Chew say why he was not in agreement?

A. Yes; I recall he said that there was no necessity of two receiving \$750 a month, but that he was willing that Mr. Kan come back at \$500 a month.

Q. What did you tell Mr. Chew?

A. I was in agreement with him and I so communicated to Mr. Kan.

Q. Calling your attention to the meeting at Mr. Hatch's office where something was said about a release, what was said about a release?

A. The release was just in the form of an agreement between the two of us that we would let bygones be bygones and not take up our clashes and bickerings.

Q. Wouldn't a word between you be enough?

A. In my opinion my word would have been enough.

Q. What about Mr. Kan's word?

A. I wanted to get something in writing.

Q. Just precisely what did you want him to write?

A. It was not my suggestion that the release be

(Testimony of Ernest Tsang.)

drawn up. I brought the matter to Mr. Hatch and he suggested that such a release be drawn up.

Q. You mean he was your lawyer or he was going to be the arbitrator? [196]

A. No. I frequently consulted him previously about the Cathay House and I went to Mr. Hatch.

Q. I want to know what the release was?

A. Nothing was drawn up. I left it to Mr. Hatch.

Q. You were there when Mr. Hatch talked about bygones, letting bygones be bygones.

A. Yes, along those lines. It never reached a point where it was drawn up.

Q. You testified on direct examination that you always were willing to give Mr. Kan his job back.

A. I have been.

Q. Up to what point have you been?

A. Up to the point of the gun incident.

Q. What was the date of the alleged incident with the gun?

A. The incident of the gun occurred around the early part of December, 1943, shortly after he returned from the Army.

Q. Then in December, 1943, you were not going to give him his job back?

Mr. Hatch: That is objected to as being immaterial, irrelevant and incompetent.

The Court: He may answer.

A. It was not until January, at the meeting in Mr. Hatch's office, that I did not want to give him back his job, but up to the time of the gun incident I was still willing to give him back his job if

(Testimony of Ernest Tsang.)

Mr. Hatch could proceed along lines to bring us into harmony. [197]

Q. Then there were no conditions attached?

A. They were conditions of my own.

Q. It was at that time that you resolved you were never going to give him the job back?

A. I did not resolve not to give him his job back.

The Court: Is that all with this witness?

Mr. Karesh: That is all.

Redirect Examination

By Mr. Hatch:

Q. When you made an additional investment in the Cathay House, that is after the initial investment of \$2,000, was Mr. Kan given the same opportunity to come in and make an additional investment? A. Oh, yes, he was.

Q. Did you have any idea whatsoever at the time the transfer was made from the corporation to the partnership and the partnership articles were signed that Mr. Kan had any expectation of returning?

A. None whatsoever.

Q. Was it your understanding that he had enlisted for the duration of the war?

A. That was my understanding.

Q. And the war was not over at that time?

A. That is correct.

Q. As far as you knew he might or might not ever come back? A. That is correct.

Q. When it would be you had no idea?

A. That is correct.

Mr. Hatch: No further questions.

The Court: Step down. [198]

Mr. Karesh: I will recall Mrs. Kan.

Mr. Hatch: Is this rebuttal?

Mr. Karesh: Yes.

Mr. Hatch: Before the defense closes I wish to add that the judgment in the State Court we have referred to already has become final, and I do not have a certified copy of the remittitur. I trust that Mr. Karesh will stipulate that the judgment of Judge Deasy was affirmed by the District Court of Appeal and that the remittitur was filed more than sixty days ago. That stipulation I request without prejudice to his objection that it is immaterial, irrelevant and incompetent.

Mr. Karesh: So stipulated.

The Court: Let the record so show.

Mr. Hatch: The defense rests.

HELEN KAN

recalled on behalf of petitioner in rebuttal; previously sworn.

Q. (By Mr. Karesh): Mrs. Kan, do you recall when your husband was in service that Mr. Tsang had some conversation with you about a transfer of the corporation? A. Yes.

Q. Did you tell Mr. Tsang that you would prefer to wait until your husband came back from the service?

A. I told him that I expected my husband home

(Testimony of Helen Kan.)

on furlough, I [199] did not know exactly when, but I would like to wait.

Q. What did he say?

A. He seemed to be in a hurry to get the papers through. He said that it was near the end of the fiscal year, and he wanted to have the meeting and change it over to the partnership.

Q. Am I correct that your testimony is that you told him your husband would soon be home on furlough?

A. Yes, I told him, I did not know when, but I expected him.

Q. How much salary were you making when your first started? How much salary were you making when you first started?

A. I worked evenings during the dinner time and my salary was \$65 a month.

Q. When was your salary raised?

A. When my husband went in the Army it was raised to \$150 a month working full time, and then it was increased to \$175.

Q. At the meeting when the corporation was changed to a partnership was any discussion had about the protection of your husband's rights?

A. No, not at all.

Q. Was anything said about your husband would be looked out for?

A. I made the statement that I did not care what Mr. Tsang did in the interest of the business, but that my main reason was that when my husband came back his status would be the same. The book-

(Testimony of Helen Kan.)

keeper was there, and spoke about the money of Mr. Tsang saving the business, that Mr. Tsang was general partner [200] and took all responsibility, and was liable for everything.

Q. Who else was there, do you remember?

A. Well, Mr. Philip Fong, Mr. George Chew, Mrs. Carter, Mr. Yuke, myself and Mr. Tsang.

Q. Who did all of the talking?

A. Mr. Tsang and Mr. Yuke did most of the talking.

Q. Who was the one that was praising Mr. Tsang? A. Mr. Yuke.

Q. It is true, is it not, that when Mr. Kan went into the service he volunteered for the duration of the war? A. That is right.

Q. In anticipation of his being away he executed to you a general power of attorney?

A. That is right.

Q. To look after his interest in the Cathay House? A. Yes.

Q. He had no particular interest to be covered by a power of attorney?

A. No, not that I know of.

Q. He also admonished you at that time if anything came up in regard to the Cathay House other than routine matters you were to consult his attorney, Sidney Romer? A. Yes.

Q. When the articles of partnership were submitted for your signature and the signature of your husband, you did take the matter up with Mr. Romer?

(Testimony of Helen Kan.)

A. Well, Mr. Tsang showed me some papers which he had drawn up, and asked me to look at them, and he took them down to Mr. Romer.

Q. And Mr. Romer did approve them?

A. Yes, he said they were technically correct.

Q. He also approved the plan in order to minimize the taxes?

A. That is correct, that is what I was led to believe.

Q. At that time your husband was in the Army in this country? A. Yes.

Q. You were in constant communication with him? A. I wrote him.

Q. You were able to reach him on the telephone or telegraph or by mail inside of a few days' period?

A. Yes, if the mail went through; I could not reach him by telephone unless he called me.

Q. As a matter of fact, the matter of a change over to a partnership was brought to your husband's attention at least tentatively before he went into the Army?

A. Well, he did not discuss it with me, but I understood that Mr. Tsang was in favor of the change.

Q. That is, before your husband went into the service? A. Yes.

Mr. Karesh: No further questions.

The Court: Is that all from this witness? [202]

Mr. Hatch: Yes.

JOHN J. KAN

recalled in rebuttal; previously sworn.

Mr. Karesh: Mr. Kan, at the first meeting you had with Mr. Tsang did Mr. Tsang tell you to go back to work at \$500 a month and we will decide on the 750? A. He never mentioned it.

Q. Tell us just what was said in that regard.

A. Well, when we came to discuss the salary, I told Mr. Tsang why don't I go back at 500 a month until it can be decided by Mr. Chew whether the salary would be 500 or 750.

Q. What did he say?

A. He said it would be best to wait until Mr. Chew came in town.

Q. Did Mr. Tsang ever tell you that you could go back at \$500 a month without signing any release? A. No.

Q. Did you ever have any conversation with Mr. Tsang relating to the change of business from the corporation to a partnership?

A. We had several discussions about different phases of operation, nothing concrete.

The Court: His wife testified it was discussed before he went into the service, is that right?

A. I believe it was discussed. [203]

Q. (By Mr. Karesh): Tell us what was said at the discussion? Your wife has testified you had a discussion.

A. Well, I think we were discussing taxes at that time, just prior to my entry into the United States Army, and there was a discussion between

(Testimony of John J. Kan.)

Mr. Tsang and myself as to what would be the best way to save taxes. It was not much further than that.

Q. Did you ever approve the transfer from the corporation to the partnership? A. I did not.

Q. When you went into the service did Mr. Tsang tell you when you came back everything would be the same?

A. Yes, he did repeatedly tell me that.

Q. You enlisted in the armed forces?

A. I did.

Mr. Karesh: No further questions.

Mr. Hatch: No questions.

Mr. Karesh: There is just one more thing, Mr. Romer had to be in Oakland, and Mr. Romer informed me that his testimony would be that he asked Tsang or Hatch to wait if possible until Mr. Kan came back, so that he could look over this transaction for the transfer of the corporation to the partnership. I wonder if you would stipulate that Mr. Romer would say that.

Mr. Hatch: We will stipulate on the strength of Mr. Karesh's statement that Mr. Romer would so testify, together with the testimony of Mr. Tsang that it was not addressed to [204] him, or my testimony it was not addressed to me. I never spoke to Mr. Romer before he came to my office. But I think it is an inconsequential matter. The reason for it was that they wanted to save taxes immediately, and there was no indication when Mr. Kan

would return. He might have stayed in the Army for another twenty years, if the war continued.

Mr. Karesh: We rest.

Mr. Hatch: Nothing further.

(Testimony closed.)

[Endorsed]: No. 11891. United States Circuit Court of Appeals for the Ninth Circuit. Ernest Tsang, appellant, vs. John Joseph Kan, appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 5, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,891

ERNEST TSANG, et al.,

Appellant,

vs.

JOHN KAN,

Appellee.

STATEMENT OF POINTS ON APPEAL

Rule 19 (6)

The following is a statement of the points upon which appellant intends to rely and designates the

entirety of the record for the consideration thereof:

(1) The Findings of Fact are contrary to law and beyond the jurisdiction of the District Court in that they are contrary to the Findings of Fact made by the state court, which latter findings were final and therefore *res judicata*.

(2) The Conclusions of Law and Judgment are contrary to law and beyond the jurisdiction of the District Court in that they are contrary to the Findings of Fact, Conclusions of Law and Judgment made by the state court, which latter findings, conclusions and judgment were final and therefore *res judicata*.

(3) The Findings of Fact are and each of them is contrary to the evidence.

(4) The Conclusions of Law are and each of them is contrary to the evidence and the law applicable thereto.

(5) The Judgment is contrary to the evidence and the law applicable thereto.

(6) The court should have granted the Motion for Dismissal.

(7) The court should have granted the Motion for New Trial.

(8) The court should not have granted the Motion to Vacate Order and for Reconsideration.

(9) The court should have granted judgment to respondent in accord with the First Defense set forth in his Answer.

(10) The court should have granted judgment to respondent in accord with the Second Defense set forth in his Answer.

(11) The court should have granted judgment to respondent in accord with the Third Defense set forth in his Answer.

(12) The court should have granted judgment to respondent in accord with the Fourth Defense set forth in his Answer.

(13) The court should have granted judgment to respondent in accord with the Fifth Defense set forth in his Supplement to Answer.

(14) The court should have granted judgment to respondent in accord with the Sixth Defense set forth in his Supplement to Answer.

/s/ ROBERT E. HATCH,
Attorney for Appellant.

Copy received April 16th, 1948.

/s/ FRANK J. HENNESSY,
/s/ J. M. KARESH,
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[Endorsed]: Filed April 21, 1948.

No. 11,891

United States
Circuit Court of Appeals
For the Ninth Circuit

ERNEST TSANG,

Appellant,

VS.

JOHN JOSEPH KAN,

Appellee.

Appellant's Opening Brief

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No. 11,891

United States
Circuit Court of Appeals
For the Ninth Circuit

ERNEST TSANG,

Appellant,

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Appellee.

Appellant's Opening Brief

**STATEMENT OF THE PLEADINGS AND
JURISDICTIONAL FACTORS**

The pleadings consist simply of the Petition of John Joseph Kan (Tr. 1) and the Answer of Ernest Tsang (Tr. 5), together with a Supplement to said Answer (Tr. 12).

According to the Findings of Fact, jurisdiction in this case was pursuant to Section 8 of the Selective Training and Service Act of 1940, as amended, 50 U.S.C.A. App. 308, and Section 7 of the Service Extension Act of 1941, as amended, 50 U.S.C.A. App. 357.

STATEMENT OF THE CASE

The facts in this case are without substantial dispute. As reflected in the Memorandum Opinion (Tr. 15) and the Findings of Fact (Tr. 20) appellant Ernest Tsang and appellee John Kan, with others, were stockholders in a California corporation by the name of The Cathay House. It operated a restaurant at 718 California St., San Francisco. At the time concerned, Kan and others owned minority shares while Tsang owned a majority of the stock; Tsang was president, Kan was not an officer and the immediate operation of the business was by Tsang and Kan as co-managers, each one drawing a salary of \$500.00 a month, fixed by the Board of Directors.

The corporate history disclosed an almost vitriolic enmity between Kan and Tsang. Originally they with others were stockholders and officers. When business was bad and additional capital was needed, Kan either would not or could not furnish more money and the burden of producing further funds fell upon Tsang. Because of this, over a period of years Tsang purchased additional blocks of stock until it reached the point where he owned over one-half of the outstanding capitalization. Finally, Tsang was elected to the presidency and Kan was voted out of executive office.

On July 23, 1943, Kan enlisted as a private in the United States Army. Four months and three days later he received a discharge. The entirety of this service was in California and Michigan. During all of this time Helen Kan, wife of appellee, also one of the employees and a stockholder, held a power of attorney from John Kan, with the admonition that on all matters affecting The

Cathay House she should consult with his San Francisco attorney, Sidney A. Romer.

During the period of Kan's service, a limited partnership known as The Cathay House was organized to take over the business. This was in accord with the then trend to avoid the high corporation and excess profits taxes and to avail of the more favorable taxes appertaining to copartnerships. The Articles of Copartnership were subscribed to by Kan through his wife as attorney in fact, after first receiving the approbation of their said attorney. The limited partners were the same persons with the identical proportions as the stockholders in the corporation; also Tsang was designated as the sole general partner.*

The partnership took over the business on October 1, 1943 and by the provision of the articles, was to exist for a period of three years thereafter.

Shortly thereafter, Kan, upon his emergence from the army, returned to San Francisco and consulted Tsang with regard to going back to work. There followed a series of meetings between the two with an undercurrent of unfriendliness due to the great strife between these two individuals during the corporate existence preliminary to Kan's enlistment. Tsang was skeptical of Kan's protestations of good intentions, being dubious that if Kan returned he would not revert to his tendencies toward trouble making and insubordination. For a clarification of the picture he arranged a meeting with Kan in the

*Because of this he alone was the one responsible for the debts of the enterprise, the others being invulnerable; 2483 California Civil Code.

office of the company's attorney, Robert E. Hatch. Another such meeting ensued wherein Mr. Romer joined.

There on behalf of the partnership Tsang, with the concurrence of George Chew, the company's secretary, offered to employ Kan at the same rate of compensation as before (\$500.00 per month). Through a misunderstanding by Romer because he had not been present in the previous meeting, or otherwise, Kan refused the offer until he was given a written contract for a three year employment. This counter-offer was rejected by Tsang, for Kan had always been on a month to month basis and was not morally or legally entitled to a more extended commitment, in writing or otherwise. The parties remained at loggerheads.

In fact, Kan never again was employed at The Cathay House. However, he made various public claims of mistreatment, including a complaint to the Selective Service authorities. As a result, Tsang filed a suit in declaratory relief in the San Francisco Superior Court on October 21, 1944, being No. 333,586, averring that Kan was making various and sundry claims, the nature and extent of which could not be determined, and praying that Kan be compelled to set forth his claims in full and then that the court declare the rights and obligations of the parties under the circumstances. To this Kan filed an answer and cross-complaint, setting up two causes, *specifically referring* to the Selective Training and Service Act of 1940 as amended, claiming that he was entitled to \$750.00 per month, that it had not been paid to him, and that less the amount he had actually received elsewhere, he had been damaged in the sum of \$7,870.00; secondly, that be-

cause of Tsang's "fraud" in the premises, he had sustained an additional \$25,000 of damage.*

The case proceeded to trial in the San Francisco Superior Court, Hon. Frank T. Deasy, judge presiding, and concluded in a judgment for Tsang on all grounds. Kan appealed, whereupon there was an unqualified affirmance, remittitur issued and the judgment became final long before the trial of the present case.

In that judgment was incorporated formal Findings of Fact and Conclusions of Law (Resp. Exhibit A). The facts found included:

1. Kan's job before his war service was for \$500 per month, the period being at the pleasure of the employer.

2. There was no agreement that he would be entitled to any increase at any time, particularly he was not to receive increases equivalent to those that might be granted to Tsang.

3. Kan voluntarily consented to the transfer from the corporation set up to the partnership.

4. Within three months of his return from the service, the partnership offered him the same position he had had with the corporation, but that Kan refused to accept it.

5. Kan has never offered to return to a position of like seniority, status or pay.

6. Kan has suffered no damages.

*We emphasize that it was Kan who selected the State Court as the tribunal to hear his plaint. The G. I. Bill of Rights was not mentioned in Tsang's complaint. Defendant Kan had the choice not to submit that issue in that case, but could have filed then in the Federal Court the very complaint upon which the present case is founded. It is not a situation where he was deprived of the right to have the Federal Court rule on his claims; rather he voluntarily chose the forum, then not being satisfied with the outcome, wants a rehearing by another court. (So do all other unsuccessful litigants.)

7. Kan's conduct has been such that the employer has good and sufficient reason to believe that Kan would not be a suitable person to be employed by it.

With those facts, obviously, no court with legal propriety could grant Kan any relief against Tsang, for damages, for restitution of job, or otherwise.

The present action was commenced on April 18, 1946 (Tr. 3). The petition admittedly recites the same facts as involved in the State Court action. This appellant urged the bar of the State Court action and the special defense was heard in advance of the trial of the other issues.

At the pretrial (Tr. 36-61) it was Tsang's contention that whether or not the previous decision was binding upon the Federal Court in respect to points of law already adjudicated, it was positively binding as to any findings of *fact*; that the facts found by the State Court, particularized next above, were such as to form an absolute bar to any relief which the Federal Court or any other court could give under the Selective Training Act. In reply, Kan's counsel stated there was a differentiation of the two suits in that the former was one for damages, not for a restoration, while this action, so he said, was for the equitable relief for restoration to employment, not for damages.

The case proceeded to general trial on September 10, 1947 (Tr. 62). It developed that meanwhile the copartnership had gone out of business,* whereupon the same at-

*First, because of the expiry of the three-year period for which the partnership was formed; secondly, because Kan brought another suit in the State Court (No. 349,840) for a judicial dissolution.

torneys for Kan blandly announced to the court that they were now not asking for a restoration of employment, but for damages.

In other words, at the two hearings in 1946, they conceded that the right to damages was barred by the decision of the Superior Court and procured the District Court to hear the case because it was for different (equitable) relief. Then when the case reached trial in 1947, they urged a claim for damages alone!

The District Court held for Kan, filing a Memorandum Opinion and awarded "damages" to him in the amount of \$7,481.28, being twelve months pay at \$750.00 a month less the amount actually elsewhere earned by him during that period. From such an adjudication this appeal is prosecuted.

ARGUMENT

(1) The Judgment Appealed From Is Contrary to Law in That the Judgment of the State Court Was Res Judicata.

It is not necessary for us to contend that the State Court's judgment on the law precluded the Federal Court from reaching an independent legal conclusion.*

Our primary contention always has been and now is that the findings of the State Court as to the *facts* precluded the Federal or any other court from subsequently finding those facts to be to the contrary; taking the facts as found by the State Court, no relief properly could be given to the plaintiff by any court.

Clearly the Superior Court of the State of California

*The Selective Service Act does not provide the Federal Court has exclusive jurisdiction, merely that it shall have the power to enforce it (Tr. 48). We contended the State Court had concurrent jurisdiction (Tr. 43-44). The District Court apparently was inclined to agree (Tr. 48).

was one of general jurisdiction; the action there was in personam; both plaintiff and defendant were residents of the State of California and they voluntarily submitted to its jurisdiction. With the Superior Court's unquestioned jurisdiction, its adjudication estopped Kan from claiming to the contrary in this and in all other jurisdictions.*

The point was pleaded as the First Defense and Second Defense in the Answer (Tr. 5) and was proved by the admission in evidence of the pleadings, Findings of Fact, Conclusions of Law and the Judgment in the state court action (Resp. Exhibit A, Tr. 38).†

Additionally, the District Court had before it the opinion of the District Court of Appeal of the State of California affirming the judgment of the Superior Court, reported 78 Cal. App. 2d 275; 177 Pac. 2d 630.

In the Memorandum Opinion filed by the District Judge, it is stated (Tr. 17):

“Respondent's defense of *res judicata* is based on the foregoing State Court proceedings. It is true that the State Court made a finding that Respondent Tsang and the partnership had offered to restore Kan to the same position which he held with the Cathay House corporation, but even assuming that

*In the State of California where Kan first chose to present his case, the rule of *res judicata* has been codified. Both sections 1908 and 1909 of the California Code of Civil Procedure specifically compel California courts to recognize judgments of federal courts. The federal courts should give the same recognition to California judgments.

†Actually, it was not necessary to plead the defense; mere proof was sufficient. See *Gottschalk Mfg. Co. v. Springfield, Wire Co.*, 90 Fed. 2d 468; *Tillman v. National City Bank*, 118 Fed. 2d 631; *Bennett v. Com. Int. Rev.*, 113 Fed. 2d 837; *Donald v. White Lumber Co.*, 68 Fed. 2d 441.

such an offer met the Act's requirements *this finding cannot bind a Federal Court.*" (Emphasis supplied)

In this determination it is submitted that, by established authority both in the Federal and State Courts of the United States, the trial judge was in error. The findings of fact of the State Court in a matter wherein it has jurisdiction are binding on the Federal Court under the recognized theory of estoppel by judgment.

The general principles of *res judicata* are set forth in 34 *Corpus Juris* at page 742, as follows:

"Statement and Grounds of Doctrine. The doctrine of *res judicata*, first definitely formulated in the Duchess of Kingston's case, embodies two main rules, which may be stated as follows: (1) the judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal. (2) Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not."

Complete dissertation upon the rule, its function and necessities in giving finality to judicial actions and its estoppel against subsequent litigation concerning the same subject matter, is found in the pages immediately following the above quotation.

The pertinent rule is set forth in 30 *American Jurisprudence*, Section 178, pp. 920-922, as follows:

“It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. In such cases, it is also immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes, and seek different relief.”

For the federal courts this rule was clearly enunciated by Mr. Justice Harlan of the United States Supreme Court in *Southern Pacific Ry. Co. v. United States of America*, 168 U.S. 1; 42 L.Ed. 355, at page 377:

“The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; *and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.* This general rule is demanded by the very

object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.” (Emphasis supplied)

The rule was previously set forth in *Cromwell v. County of Sac.*, 94 U.S. 351; 24 L.Ed. 195, where it is stated that in subsequent actions between the same parties where different relief is sought, estoppel by judgment is applied as to those matters which were actually litigated in the original action.

In *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 687; 39 L.Ed. 859, 863 the Supreme Court states:

“The essence of estoppel by judgment is that there has been a judicial determination of a fact * * *. Findings of fact, although not provided for by statute, are a declaration by the Court of the matter which it determines.”

Again in *United States v. Moser*, 266 U.S. 236; 45 S.Ct. 66, an action was brought by a retired Naval Captain claiming retired pay. It had been previously determined in the Court of Claims that he had been “in service during the Civil War” including his term as a cadet. The court held that although *res judicata* does not strictly apply to questions of law “when a fact or thing is adjudged in the

original action it cannot be disputed in a subsequent action.”

Southern Pacific v. United States and *Cromwell v. Sac.*, supra, are cited with approval by the Supreme Court in *Tait v. West Maryland Railroad*, 289 U.S. 620; 53 S.Ct. 706. See also, *New Orleans v. Citizens Bank*, 167 U.S. 371; 42 L.Ed. 202.

Both *Southern Pacific v. United States* and *Tait v. West Maryland Railroad*, supra, were quoted at length in the recent case of *Union Bleachery v. United States*, 73 Fed. Supp. 496 (1947). In the subsequent action the court applied the rule of estoppel by judgment although the causes of action were entirely different.

The rule has been applied in cases of damages as was held in *Henderson v. U. S. Radiator Corp.*, 78 Fed. 2d 674. Here there was an original action by a wife and her husband for damages to their real property. Subsequently the wife sued for damages for her personal injuries and to her personal property. The damages in both suits arose from the same acts of negligence. The court held that the issue of negligence was finally determined in the first suit and the determination of those facts was binding upon the parties and the court in the second action.

The rule is again set forth in *Vapor Car Heating v. Cold Car Heating*, 7 Fed. 2d 284, 287, where the court states:

“A question or fact, distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, or, even if the second suit is for a different cause of action, * * *.”

The rule distinguishing between *res judicata* as to the entire cause of action and estoppel by judgment as to facts in issue determined by the prior Court is set forth in *Gottschalk Mfg. Co. v. Springfield Wire Co.*, 90 Fed. 2d 468, 471 as follows:

“There is a difference sometimes overlooked, between the effect of a judgment as a bar to the prosecution of a second action for the same cause and its effect as an estoppel in another suit between the same parties upon a different cause of action. In the former case a judgment on the merits must be pleaded, and is an absolute bar to a subsequent action; it concludes the parties, not only as to every matter which was offered and received to sustain or defeat the suit, but also as to any other matter which might have been offered for that purpose. In the latter case, the judgment in the prior action may be offered in evidence, and operates as an estoppel only as to those matters which were there directly in issue and either admitted by the pleadings or actually tried.”

The prior judgment by a state court is binding on a federal court as long as the original court had jurisdiction over the parties.

This Circuit has passed specifically on this point in *Lineker v. Marshall*, 7 Fed. 2d 878 (C.C.A. 9th) where there was an original suit in the Superior Court of Stanislaus County that gave judgment on a promissory note and trust deed. A subsequent action was brought in the federal courts based on a second trust deed. The court clearly stated that the second case in the federal courts was for a different cause of action than the previous suit in the Superior Court but the facts determined by the

Superior Court as to the amount due on the promissory note were binding. The opinion quotes at length from *Southern Pacific v. United States*, supra, and at page 878 states as follows:

“* * * and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, must be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.”

Particularly in point is *Forsyth v. Hammond*, 166 U.S. 506; 41 L.Ed. 1095, where there was a state court decision in Indiana providing for the annexation of certain property owned by the plaintiff and taxes were levied against such property. Subsequently, the plaintiff brought an action in the Federal Court to enjoin the tax collection. The Federal Court reached a decision on the facts squarely contrary to the previous decision of the State Court. The Supreme Court *reversed* the lower court and at page 1100 of 41 L.Ed., states:

“Though the form and causes of action be different a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions.”

A similar case is *National Surety v. Ellison*, 88 Fed. 2d 309.

In *Continental Bank v. Holland Bank*, 66 Fed. 2d 823, the plaintiff recovered judgment against the defendant bank in a state court for \$97,274.85. Thereafter the defendant bank was re-organized and subsequently liquidated under federal receivership. A new action was brought contesting the validity of the plaintiff's claims and it was alleged that the findings of the state court on the subject of the amount due was a miscarriage of justice. The Circuit Court held that the judgment of the state court was binding and, at page 829, stating:

“Apparently counsel have misapprehended the force and effect of the state court judgment. Neither the United States District Court nor this court can by way of review or otherwise allow appellants to re-litigate issues which were tried and determined against them in the state courts. Neither the findings of fact in the state court nor the sufficiency of the evidence adduced in support thereof are here open to question.”

(2) The Award of Damages Was Contrary to the Evidence and Law Applicable Thereto.

We contend the detailed evidence received in the District Court compelled a judgment for the defendant, appellant. In relation to his position before induction, Kan agreed (1) his rate of pay was \$500 per month and (2) the term of his employment was at the pleasure of the employer (he had no contract, written or oral, for any specific period).

As to the time when he sought reemployment, Kan agreed that although he wanted \$750 per month, the last amount he asked the employer for was \$500 per month and also he told the employer he would not return to

work unless he be given a written contract insuring his employment over a period of years; after so expressing himself he did not subsequently indicate otherwise.

The District Court held that Kan actually was entitled to \$750 per month and that the employer breached his statutory obligations by not agreeing to restore the position at more than \$500 per month (Tr. 26).

In this respect we contend the court was in error. The former employee had the undoubted right to accept a lesser pay than the maximum to which he was entitled. When he told the employer that \$500 was the amount he "would be satisfied with" there could have been no obligation, statutory or otherwise, upon the employer to *insist* upon him taking more. In the absence of an obligation, no one could be responsible for damages for a breach.

The evidence showed demonstratively that the failure to effect a reemployment was due entirely to Kan's insistence upon a written contract of employment for an extended period.

Therein the fault lay with Kan, because he was not entitled to make any such requirement a condition precedent to his reemployment. He, therefore, was the one solely responsible for his not returning to work, by reason of which he has no ground to complain against the appellee. (That is exactly what the Superior Court held.)

(3) The Expiration of the Partnership Term Barred Any Relief.

In the Fifth Defense set forth in the Supplement to Answer (Tr. 12), it was pleaded that the partnership was for a three year term which expired October 1, 1946, whereas the trial and judgment were not until the fol-

lowing year (Tr. 20). At the latter time obviously the employment could not have been reinstated, either voluntarily or by any court order.

This returns us to the solemn assurance in 1946 by counsel for the petitioner that the Federal Court could and should take jurisdiction because the reemployment was the only relief sought herein, while conceding that it already had been competently adjudicated that he was entitled to no damages.

However, when realization of this point was reached, petitioner reversed to the exact opposite position and the only relief granted by the District Court was for damages.

(4) Petitioner Was Estopped From Any Relief.

The Sixth Defense pleaded in the Supplement to Answer (Tr. 13) asserted that subsequent to initiating this action and before trial, Kan brought another suit, i.e., San Francisco Superior Court No. 349,840, wherein he prayed for a judicial dissolution of said partnership; that said prayer was granted (albeit, by consent of all partners); that on August 30, 1946 (before the trial of this action) all of the assets of the partnership were sold by the receiver appointed in said proceedings and ever since there have been no partnership and no Cathay House business.

It also appeared that in said proceedings the Superior Court made an order that all creditors' claims against the partnership would have to be filed on or before August 26, 1946 or be forever barred; that Kan filed no claim within such time.

In other words, in August 1946, Kan was of record in the present proceeding that the only relief he was claim-

ing was for a return of his position, and not for damages, while contemporaneously he procured a dissolution of the partnership with an attending order that all claims (particularly including damages) would be barred unless asserted before August 30; then without ever filing any such claim, he subsequently reversed his position in the present case and demanded damages against the general partner, i.e., the partnership itself.

We submit that the relief granted against Tsang under such circumstances was abhorrent to all concepts of fairness and the courts should rule Kan to be estopped.

MISCELLANEOUS

The other specifications in the Statement of Points on Appeal (Tr. 255), i.e., items (6), (7) and (8), we believe are sufficiently covered by the argument under the preceding three headings.

CONCLUSION

Appellant prays that the judgment of the District Court be reversed with instructions to enter judgment in favor of defendants and for such other relief as may be proper.

Dated: July 10, 1948.

Respectfully submitted,

ROBERT E. HATCH,
Attorney for Appellant.

LEMUEL H. MATTHEWS, .
Of Counsel for Appellant.

No. 11,891

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ERNEST TSANG,

VS.

JOHN JOSEPH KAN,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

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No. 11,891

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ERNEST TSANG,

VS.

JOHN JOSEPH KAN,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Northern District of California awarding damages to the appellee, an Army veteran of World War II, in the sum of \$7481.28, for loss of wages because of the unlawful refusal and failure of the appellant herein to reemploy appellee in the position which he occupied prior to his entrance into the service, or in any position of like seniority status and pay, contrary to Section 8 of the Selective Training and Service Act of 1940, as amended (50 U.S.C.A. App. 308) and Section 7 of the Service Extension Act of 1940, as amended (50 U.S.C.A. App. 357).¹

¹See Appendix.

STATEMENT OF THE CASE.

Appellee can not accept appellant's statement on page 2 of his opening brief that the facts as he sets them forth "are without substantial dispute". The appellee believes that the facts are as found by the Court in its memorandum opinion and its findings of fact and conclusions of law approved in conformity with the said opinion.

Appellee now sets forth in full the memorandum opinion of the Court below and the findings of fact and conclusions of law it approved, because (1) of the dispute between appellant and appellee as to what is a correct "Statement of the Case", and because (2) he intends to rely strongly on this opinion and these findings, the authorities cited and legal principles enunciated therein, as his argument on appeal:

"MEMORANDUM OPINION

ROCHE, District Judge: This is an action brought under Section 8 of the Selective Training and Service Act of 1940, as amended. The petitioner originally sought employment reinstatement together with compensation for loss of wages and benefits resulting from respondents' alleged refusal to reinstate him, but he now asks only a money judgment for such compensation, waiving other rights that he may have under the Act.

Respondents defend on two grounds: First, that the issues herein have already been decided adversely to petitioner in certain proceedings in the superior court of the state of California, and second, that respondents offered to re-employ the

petitioner at the salary he was receiving when he entered the armed forces but that petitioner refused to accept the offer unless it would include a three year contract of employment.

The record discloses that the petitioner Kan was not only one of the founders of the Cathay House, a restaurant in San Francisco, but its active head and the man whose energy and ability were largely responsible for its phenomenal success. After its founding the respondent Tsang bought shares of stock in the business and he and the petitioner became the President and Secretary respectively, of the corporation. They were co-managers, each receiving the same salary. When Kan received a salary increase, Tsang likewise received an increase. When Kan enlisted in the armed forces on July 23, 1943, he and respondent Tsang were both making \$500 a month. At that time, Tsang, by additional purchases of shares of stock, had gained a controlling interest in Cathay House.

While Petitioner was in the service the corporation was changed to a partnership, Tsang becoming a general partner and petitioner a limited partner, along with others. This change was agreed to by petitioner's wife, who was also employed at Cathay House and to whom petitioner had given power of attorney, but the evidence is conflicting as to whether she and her counsel endeavored to have the change delayed until the petitioner came home on leave. In any event, the change was one of form only. The interested parties remained the same and the restaurant business was conducted as before. Such a reorganization was ineffective to cut off the petitioner's rights under the Selective Service Act.

The petitioner was honorably discharged from the service on November 26, 1943, and shortly thereafter asked respondent Tsang to reemploy him. Tsang was then earning \$750 per month.

From this point on the record contains much conflicting testimony but it does clearly appear that at no time during the negotiations that followed petitioner's request for reemployment was the petitioner offered the position of co-manager with the same salary as Tsang was then receiving. The most that was offered was his old salary of \$500 a month and there is persuasive evidence that even that offer was conditioned on Kan's signing what the parties denominated a 'waiver' or 'release'. The situation culminated in Tsang's filing an action for declaratory relief in the state court, in which Kan filed an answer and cross-complaint. Judgment was given in favor of Tsang. Kan and three others subsequently filed a suit for an accounting and dissolution of the partnership. The partnership was dissolved and the property sold, Tsang being the purchaser.

Respondents' defense of res judicata is based on the foregoing state court proceedings. It is true that the state court made a finding that respondent Tsang and the partnership had offered to restore Kan to the same position which he had held with the Cathay House corporation, but even assuming that such an offer met the Act's requirements, this finding cannot bind a federal court. The same defense of res judicata, based on a declaratory judgment rendered by the Ohio state court, was raised by the respondents in the case of *Trailmobile Co. v. Whirls*, 154 F. 2d 866, an action by a veteran for restoration to his seniority status as it existed prior to his entry into

military service. The Sixth Circuit Court of Appeals disposed of the defense in the following language: 'The interpretation by the state court of the rights of a citizen under a federal statute is not binding upon the federal courts.' The question for decision is thus one of fact—did any offer of reemployment made by respondents to petitioner comply with the terms of the Act.

So far as pertinent, the Act provides that if a position, other than a temporary position, was in the employ of a private employer, the person so employed shall be restored to such a position unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. It is further provided that such restoration shall be without loss of seniority. The courts have been very liberal in construing these provisions, having in mind the purpose of the statute. They are more than patriotic promises. Rather, they are a guarantee to the honorably discharged veteran that, upon application timely made, he will be restored to his former position or to one of like seniority status and pay and that he will lose no seniority in the process. If during the veteran's service in the armed forces, the person filling his position receives a higher salary, an offer to reemploy the veteran at his old salary is not a compliance with the Act. The veteran must be given the benefit of any wage increases that have been made during his absence. *Salter v. Becker Roofing Co.*, 65 F. Supp. 633. To the same effect are the decisions of the United States District Court for the Southern District of California in *Parker v. Boyce* and *Covey v. Douglas Aircraft Co.*

In the instant case, when the petitioner enlisted in the army he was co-manager with the respondent Tsang of the Cathay House and received the same salary. Upon his honorable discharge and application for reemployment, he was entitled to be restored to the position of co-manager and to receive the same salary that Tsang, the other co-manager, was receiving. An offer of anything less was not a compliance with the Act provisions, nor was an offer conditioned on the veteran's waiving or releasing any of his rights guaranteed by the Act. Since the evidence conclusively shows that respondents failed to offer to restore the petitioner to his position as co-manager at the increased salary which respondent Tsang was then being paid, it follows that judgment must be entered in favor of the petitioner.

Petitioner having waived his claim for reinstatement and for all back pay, except for a twelve month period, it is

ORDERED that there be entered herein, upon findings of fact and conclusions of law, judgment in favor of the petitioner in the sum of \$7,481.28, that being 12 months back pay at \$750.00 a month less \$1,518.72 earned by him from December 4, 1943, the date of his application for reinstatement, to December 4, 1944, and that respondents shall bear the costs.

Dated: November 13, 1947.

MICHAEL J. ROCHE,
United States District
Judge."

(Tr. 15-19.)

“FINDINGS OF FACT AND
CONCLUSIONS OF LAW.

This case came on for trial September 10, 11 and 12, 1947, before Honorable Michael J. Roche, United States District Judge, sitting without a jury; the petitioner, John Kan, appearing by his attorneys, Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, Rudolph J. Scholz, Esq. and Joseph Karesh, Esq., Assistant United States Attorneys for the said district; the respondents Ernest Tsang, L. M. Carter, George Chew, Philip Fong and Paul Yuke, by their attorney, Robert E. Hatch, Esq., and the other respondents George Chin and Fred Leong, by consent filed in open Court, consenting to a judgment in favor of petitioner, and the evidence having been received and the matter having been orally argued and briefed and fully considered, the Court now makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT.

I.

This is an action under Section 8 of the Selective Training and Service Act of 1940, as amended, 50 U.S.C.A. App. 308, and Section 7 of the Service Extension Act of 1941, as amended, 50 U.S.C.A. App. 357, and the jurisdiction of this Court is based thereon.

II.

Petitioner is a resident of the City and County of San Francisco, State of California.

III.

Respondents at all times herein mentioned were a copartnership consisting of Ernest Tsang, a General Partner, and L. M. Carter, George Chew, George Chin, Philip Fong, Fred Leong and Paul Yuke, together with petitioner and Helen Kan, his wife, as Limited Partners, and maintained a place of business, a restaurant known as the CATHAY HOUSE, at 718 California Street, San Francisco, California. At the time petitioner left the employment of respondents it was a corporation and was changed to a copartnership while petitioner was in the Army of the United States. Prior to September 28, 1939, petitioner Kan, in association with an individual, not a party to this action, commenced the business of operating Cathay House. Petitioner Kan interested respondent Tsang in purchasing stock in the said corporation. Respondent Tsang become President and Kan became Secretary of said corporation and they were the sole persons actively engaged as managers in the actual operation of the restaurant. The interests of the other stockholders were financial only.

IV.

On or about the 23rd day of July, 1943, at San Francisco, California, petitioner volunteered for service in the armed forces of the United States and was inducted into the Army of the United States and immediately thereupon entered the said service. Immediately prior to petitioner's entrance into said service he was employed by the aforesaid corporation as a General Manager thereof at a salary of \$500 a month. Immediately

prior to petitioner's induction into the Army of the United States respondent Ernest Tsang was likewise employed by the aforesaid corporation as a co-manager thereof at a salary of \$500 a month. At one time prior to petitioner's induction into the service, petitioner and respondent Tsang were compensated at the rate of \$200 per month. Thereafter both petitioner and respondent Tsang received simultaneous increases in pay from \$200 to \$300 a month, and from \$300 per month to \$500 per month.

V.

At the time petitioner entered the Army of the United States respondent Tsang was the owner of the majority of the stock in the aforesaid corporation. When the aforesaid corporation was changed to a copartnership respondent Tsang had the majority and controlling interest in the said copartnership and was in charge of the said business. During the time petitioner was in the armed forces respondent Tsang's salary was raised from \$500 per month to \$750 per month.

VI.

Petitioner left his aforesaid position on or about the 23rd day of July, 1943, for the sole purpose of entering the military service of the United States. Shortly before this date petitioner, in preparation for departure for the armed forces, executed and delivered to his wife, Helen Kan, a power of attorney to act for him in his absence, in connection with said business. At or about the same time, respondent Tsang, as President of the said corporation and the sole re-

maining active manager, promised and agreed with petitioner and his wife, Helen Kan, that he, respondent Tsang, would diligently protect petitioner's interests in the business. Thereafter Helen Kan assented, on behalf of herself and the petitioner, to the change of Cathay House from a corporation to a copartnership. The change was one of form only. The interested parties remained the same and the restaurant business was conducted as before.

VII.

Petitioner satisfactorily completed his period of service in the Army of the United States on the 26th day of November, 1943, and on that date received an honorable discharge evidencing such satisfactory completion.

VIII.

On or about December 4, 1943, petitioner made timely application to Cathay House, and more particularly to respondent Tsang, for restoration to the position hereinabove described.

IX.

The former position, hereinabove described, left by petitioner on or about the 23rd day of July, 1943, to enter the Army of the United States, was a position other than temporary. At the time of his application for his former position, and at all times thereafter, petitioner was qualified to perform the duties of said position as set forth under the law.

X.

Petitioner in making application for reinstatement, stated to the respondent Tsang that he believed he was entitled to the same salary as that which respondent Tsang received, to-wit, \$750 a month, but declared that he was willing to work for \$500 per month until the amount of salary would be definitely determined.

XI.

During December, 1943, and January, 1944, petitioner continued to request of respondent Tsang reinstatement to his former position and negotiations were carried on during this period of time. In the latter part of January, 1944, respondent Tsang refused to reinstate petitioner at a salary of \$500 a month without attaching certain conditions to petitioner's reemployment. These conditions were: that petitioner sign a release waiving any rights he might have under the Selective Training and Service Act, approving the change of the Cathay House from a corporation to a copartnership and transferring his stock to his wife, Helen Kan. Petitioner stated he would not sign such a release to be employed at \$500 a month unless he were given a three-year contract. Respondent Tsang stated that under no condition would he employ petitioner for any period of time without petitioner signing the release, as above described, at a salary no more than \$500 per month.

XII.

Respondent Tsang at all times has refused to reemploy petitioner at a salary of \$750 a month.

XIII.

Respondent Tsang determined at the time petitioner made the request for reemployment, that he would under no circumstances rehire said petitioner at any salary and the conditional offer of reemployment that he made was such that he knew the petitioner would not accept it and such conditional offer constituted a subterfuge to prevent petitioner's reemployment.

XIV.

Immediately thereafter, as was his legal right, petitioner sought the assistance of the United States Attorney, who attempted to negotiate a settlement with the respondent Tsang through his counsel, Robert E. Hatch, Esq. These negotiations were continued through April of 1944. Petitioner indicated a willingness, through the United States Attorney, to be reemployed at a salary of \$500 a month, but respondent Tsang, through his said attorney, denied that he had any liability to reinstate petitioner to his former position under the Selective Training and Service Act of 1940 and continued in his refusal to reinstate said petitioner.

XV.

Thereafter, and on or about the 20th day of October, 1944, respondent Tsang filed a complaint for declaratory relief against the petitioner in the Superior Court of the City and County of San Francisco in connection with petitioner's reemployment rights. Petitioner filed an answer and a cross-complaint to protect his interests. The decision of the Superior Court of the City and County of San Francisco is of no moment here,

inasmuch as such decision of the State Court is not *res adjudicata* to the issues involved in our case herein.

XVI.

During the war years the profits of the Cathay House increased enormously. It was not unreasonable that the petitioner should have been re-employed at the Cathay House in the position of co-manager at a salary of \$750 a month. The position in said business of like seniority, status and pay to which petitioner is entitled is that of co-manager with respondent Tsang at a salary of \$750 per month.

XVII.

Respondent Tsang in no way has been injured by petitioner's delay in instituting this action, such delay having been occasioned by the proceeding in the State Court instituted, as hereinabove stated, by the respondent Tsang. Respondent Tsang has likewise not been injured by the delay in bringing this case to its conclusion, the greater part of such delay being the result of a stipulation between counsel herein. The remaining respondents likewise have not in any way been injured by the delays hereinabove set forth.

XVIII.

Petitioner was ready, willing and able to work for respondents from December 4, 1943 to December 4, 1944, and continuously thereafter, but as a result of the unlawful action of the Cathay House, and more particularly that of respondent Tsang, petitioner was not reinstated. From December 4, 1943 to December 4, 1944, petitioner

earned in another position the sum of \$1518.72. By reason of the respondents' unlawful action, and more particularly that of respondent Tsang, in failing and refusing to reemploy petitioner, either in his former position or in a position of a like seniority, status and pay, he suffered a loss of wages between December 4, 1943 and December 4, 1944, in a sum of \$7481.28, that is to say, he, the petitioner, suffered a loss of twelve months' pay at \$750 a month, less \$1518.72.

XIX.

Petitioner does not request or desire reinstatement to his former position, but at no time since December 4, 1943, did petitioner abandon his right to reemployment and reinstatement in his former position with the Cathay House, and at all times has diligently pursued his claim for such employment.

CONCLUSIONS OF LAW.

The reorganization of the Cathay House from a corporation to a copartnership was ineffective to cut off petitioner's rights under the law.

Respondents, and more particularly respondent Tsang, unlawfully failed and refused from December 4, 1943 to December 4, 1944, and at all times thereafter, herein mentioned, to reemploy petitioner in his former position or in any position of like seniority, status and pay, contrary to Section 8 of the Selective Training and Service Act of 1940, As Amended (50 U.S.C.A. App. 308), and Section 7 of the Service Extension Act of 1940, As Amended (50 U.S.C.A. App. 357), and by reason thereof, petitioner suffered loss of

wages amounting to \$7481.28 between December 4, 1943 and December 4, 1944, and is entitled to be compensated by the respondent Ernest Tsang, General Partner, and by the said copartnership, consisting of the said Ernest Tsang, General Partner and the respondents L. M. Carter, George Chew, George Chin, Philip Fong, Fred Leong and Paul Yuke, Limited Partners, doing business, together with petitioner and Helen Kan, his wife, also Limited Partners, under the name of Cathay House, in the said amount of \$7481.28.

Let judgment be entered accordingly forthwith, with costs of suit to be paid by respondents hereinabove described.

Dated at San Francisco,
California, January 16,
1948.

MICHAEL J. ROCHE

United States District Judge."

(Tr. 20-28.)

THE LAW AS FOUND BY THE COURT.

After finding, most significantly, among other things, as a fact that "respondent Tsang determined at the time petitioner made the request for reemployment that he would under no circumstances rehire the said petitioner at any salary and the conditional offer of reemployment that he made was such that he knew the petitioner would not accept it and such conditional offer constituted a subterfuge to prevent petitioner's reemployment", (Finding of Fact, XIII, *supra*), the

Court enunciated, as an analysis of his opinion will show, the following legal principles:

1. Reorganization of a business from a corporation to a partnership while the employee is in the armed forces is ineffective to cut off employee's rights while interested parties remain the same and the business is conducted as before.

2. Finding of State Court that veteran had been offered restoration of employment in conformity with requirements of the Selective Training & Service Act is not *res judicata* and binding on the Federal Court.

3. Veteran must be given the benefit of any wage increases offered during his absence and any lesser offer is not a compliance with the Act.

4. Any offer of reemployment conditioned on the veteran releasing or waiving any of his rights guaranteed by the Selective Training & Service Act is not a compliance with the said Act.

5. Veteran who is refused reinstatement for a period greater than twelve months and who before the Court during trial waives his claim for reinstatement is at the least entitled to receive twelve months' back pay, with all increases accruing to the position during his service in the armed forces, less what he actually earned during this period in other employment.

CONTENTIONS OF APPELLANT.

In urging this Honorable Court to reverse the judgment of the court below appellant, in his opening brief, makes the following contentions:

1. "The judgment appealed from is contrary to law in that the judgment of the State Court was *res judicata*."

2. "The award of damages was contrary to the evidence and law applicable thereto."

3. "The expiration of the partnership term barred any relief."

4. "Petitioner was estopped from any relief."

ARGUMENT.

A comparison of the "*Law as Found by the Court*" with the contentions made by the appellant shows that he does not dispute the Court's first proposition, *supra*, that reorganization of a business from a corporation to a partnership while the employee is in the armed forces is ineffective to cut off the employee's rights while the interested parties remain the same and the business is conducted as before — which is the situation in our case at bar. Accordingly appellee will not concern himself with this principle which is so firmly established.²

It is likewise apparent from a reading of appellant's opening brief that he does not challenge the Court's third proposition, *supra*, that any offer of reemploy-

²See *Doane Co. v. Martin* (CCA-1), 164 F. (2d) 537, where it was held that a change in stock ownership of a corporate entity while the veteran was in the service did not warrant refusal to re-employ. See also *Brown v. Luster*, 165 F. (2d) 181, wherein this Honorable Court held that the continuation of a partnership business in the form of a corporation was no justification to deny veteran reemployment. See also *Sullivan v. Milner Hotel Co.*, 66 Fed. Supp. 607, 610; *Karas v. Klein*, 70 Fed. Supp. 469.

ment conditioned on the veteran releasing or waiving any of his rights guaranteed by the Act is not a compliance with the Act. What appellant apparently does attack is the finding of the Court that the offer of reemployment he made to appellee was a conditional one. Accordingly, our concern is not with this legal principle which is likewise firmly established, *Burkhardt v. Crucible Steel Co.*, 68 Fed. Supp. 802. but with the question as to whether the evidence supports the finding that the offer of reemployment made by appellant was a conditional one and not made in good faith.

I.

IS THE FINDING OF THE COURT THAT APPELLANT'S OFFER OF REEMPLOYMENT TO APPELLEE WAS A CONDITIONAL ONE, AND A SUBTERFUGE, SUPPORTED BY THE EVIDENCE?

Bearing in mind the familiar rule that the Court is the sole judge of the credibility of witnesses in a trial before it without a jury, and the equally familiar rule that findings of the Court cannot be set aside unless clearly erroneous,³ appellee will now show that he should be sustained in this phase of the case.

³*Gimpelson v. Kaufman, et al.*, No. 11,660, decided April 20, 1948, F. (2d), wherein this Court in deciding a veteran's reemployment suit stated:

"There is credible evidence in this case adequately supporting the findings of the trial court on the material issues and they must be sustained since we cannot say that they are clearly erroneous. In this case the conclusions drawn from the facts disclosed in the evidence had to rest in the sound judgment of the trial court. There was conflict in the testimony, and whatever the doubts generated by this state of the record, it is not

The following testimony of appellee on direct examination clearly indicates that the offer of reemployment was a conditional one, that not only was appellant unwilling to reemploy him without imposing conditions, for a salary of \$500 a month, but also that appellant refused under any circumstances to pay him \$750 a month:

“Q. Did Mr. Hatch say anything else that he wanted you to sign over at that time, anything about a release of any kind?

A. By Mr. Kang: Well, on January 20th he wanted me to sign——

Q. I am talking about January 24th.

A. He did discuss a release at that time, on January 24th, but being that I felt there was no protection for me whatsoever if I signed over all my stock and signed a release and signed away all my right, which I had under Selective Service, I wanted a contract of employment such as Mr. Tsang had. So finally Mr. Romer suggested why didn't I go back to work without signing any papers of any sort, 'Why don't you go back to work?' And then finally Mr. Romer suggested that Mr. Tsang and I had known each other all these years, 'Why don't you get together and discuss it without the presence of attorneys?' And that was the crux of that meeting, and it was finally decided that Mr. Tsang and I would discuss it ourselves.

for this court to substitute its judgment on the evidence for that of the trial court on the probative weight of the evidence. The questions presented by the pleadings and evidence made the final determination of the trial court decisive of every material factual issue. Determination of these factual issues leaves no substantial legal issue in this case; the legal consequences of the trial court's findings are explicitly provided in the reemployment statute.”

Q. At any of these meetings up to and including January 24, was \$750 offered to you at any time?

A. No.

Q. Now, you said that meeting terminated on January 24 that you and Tsang were to get together on another meeting.

A. That is correct.

Q. Did you do so?

A. Yes, I did go back to see Mr. Tsang.

Q. How long after January 24, 1944, was that meeting?

A. I don't remember the exact date, but I think it was about a week after that I went to the Cathay House to see Mr. Tsang.

Q. Was there anybody else there besides you and Mr. Tsang that day?

A. No, just Mr. Tsang and myself, and he seemed to be agreeable to my coming back to work, and also that he would give me a contract of employment such as he had. However, he said, 'I do not think this can be final until I think about it further,' so a few days later when I did go back I asked for my job at \$500 a month again.

Q. Just a minute. At that meeting shortly after January 24th you say that Mr. Tsang was apparently in a friendly mood and agreed to give you a contract of employment?

A. Yes.

Q. Was there any condition attached to that? Did he state that you would have to do any particular thing?

A. No, there was not. It was a very short meeting.

Q. Was anything finally decided?

A. I was led to believe at that meeting that I was ready to go back to work.

Mr. Hatch: Is that the meeting of January 24th?

Mr. Scholz: No, it was shortly after that.

The Court: The week following the 24th, approximately?

Mr. Scholz: That was the week following?

A. About a week following January 24, and I thought that I was ready to go back to work. Then a few days later when I did go back to see Mr. Tsang he was very arrogant and said he did not want to talk about the matter, and just walked away, and I walked out; he didn't want me to come up to the Cathay House and be there any more.

Q. What did he say and do at that meeting?

A. I told him at that time that I was ready to go back to work—I said, 'Now, we are going to get together on this, I am willing to go back at \$500 a month.' And he said, 'Well, I thought one time things would work out but it won't work out now,' and he just walked away.

Q. He refused to discuss it?

A. He refused to discuss it.

Q. Did that terminate your endeavor to have Tsang re-employ you?

A. It did.

Q. As far as you were concerned?

A. That is right.

Q. What did you do next about re-employment? Did you go to the Selective Service or any place else?

A. I conferred with Mr. Romer and told him what had transpired in my discussion with Mr.

Tsang, and finally we did make application to the Selective Service to hear the case. The draft board, I believe, received a letter from me with all of the details.

Mr. Karesh: About when?

A. I believe that was—I have the letter right here, a copy of the letter, if you wish to see it.

Q. That was shortly thereafter?

A. It was about a month or two later. I understand that the draft board was unable to make a decision on it, and they sent it to Sacramento, and it laid up there for almost a year, and no action was taken.

Q. Mr. Scholz: Then the United States Attorney's Office contacted you?

A. I finally contacted Mr. Karesh and told Mr. Karesh about the case."

(Tr. 94-97.)

To the same effect is the testimony of Sidney A. Romer, Esq., one of the attorneys for appellee in the State Court proceedings, at pages 119, 120 and 121 of the Transcript.

Furthermore, from the lips of the appellant himself during the proceedings before the trial Court came these words which show that he never intended to comply with the Act, that the negotiations he conducted were a sham:

"Cross Examination

Q. By Mr. Karesh: You testified on direct examination that you always were willing to give Mr. Kan his job back?

A. I have been.

Q. Up to what point have you been?

A. Up to the point of the gun incident.

Q. What was the date of the alleged incident with the gun?

A. The incident of the gun occurred the early part of December, 1943, shortly after he returned from the Army.

Q. Then in December, 1943, you were not going to give him his job back?"

(Tr. p. 247.)

Realizing the damaging admission that appellant had just made, his counsel then spoke up: "That is objected to as being irrelevant and incompetent." But the Court considered it material, as its subsequent finding in this regard shows, and ruled, "He may answer." (Tr. p. 247.)

The answer of the appellant was extremely feeble. Having placed himself in an extremely untenable position appellant was unable to repair the damage although he tried:

"A. By Mr. Tsang: It was not until January, at the meeting in Mr. Hatch's office, that I did not want to give him back his job, but up to the time of the gun incident I was still willing to give him back his job if Mr. Hatch could proceed along lines to bring us into harmony.

Q. Then there were no conditions attached?

A. They were conditions of my own.

Q. It was at that time that you resolved you were never going to give him the job back?

A. I did not resolve not to give him his job back.

The Court: Is that all with this witness?

Mr. Karesh: That is all."

(Tr. pp. 247-248.)

Why, then, did the appellant make the damaging admission? Appellee believes the following is a reasonable explanation: In his direct examination appellant, in an obvious attempt to impress the Court with his magnanimity, stated that he had always been willing to reemploy appellee, but when counsel for appellee asked him, "You always were willing to give Mr. Kan his job back?" appellant decided he had gone too far. If he did not retract, he might then and there be asked to reemploy appellee, so as an excuse he created out of thin air the "gun incident" even though it was based completely on hearsay. (Tr. p. 165.)

The following recitation from the record now becomes very material to dispel any possible doubt that appellant at any time intended to comply with the Selective Service Act:

On or about January 24, 1944, after a conference between the parties and their attorneys Kan was not reemployed. Thereafter he sought redress with the Selective Service officials and the United States Attorney. The United States Attorney discussed the matter with appellant's attorney, Robert E. Hatch, Esq. A letter received by the United States Attorney from Attorney Hatch, under date of April 20, 1944, stated that the Cathay House would under no circumstances reemploy Kan. (Appellee's Exhibit 8, Tr.

215-217.) To be sure, this letter was dated more than ninety days after Kan received his honorable discharge from the Army, but regardless of this lapse of time it is expressive of the harsh attitude on the part of appellant toward appellee, and it should be remembered that negotiations had been started earlier between the attorney for appellant and the United States Attorney. (Appellee's Exhibit 7, Tr. 213-214.)

Why this attitude on the part of appellant toward appellee? Perhaps it is the old story of the recipient of a kindness hating his benefactor and turning upon him. It was Kan who took Tsang into the Cathay House, as a result of which Tsang grew rich. Are these words of appellee too strong? Not when we consider the bitter and unsupported assertion made by counsel for appellant in the closing line of his opening brief, page 18: "We submit that the relief granted against Tsang under such circumstances was abhorrent to all concepts of fairness and the courts should rule Kan to be estopped." Perhaps the best answer to this unwarranted complaint was best expressed by the court in its opinion: "The courts have been very liberal in construing these provisions, having in mind the purpose of the statute. *They are more than patriotic promises.*" (Italics supplied.)

II.

IS THE JUDGMENT OF THE STATE COURT RES JUDICATA?

Here the appellant and the Court are in complete disagreement. But the Court below has the case of *Trailmobile v. Whirls*, 154 F. (2d) 866,872, reversed on other grounds, 328 U. S. 831, as authority for the second proposition which it advances, while the appellant has no authority to buttress his position. To be sure, appellant cites cases, but none of them are concerned with the identical problem of the right of reemployment arising under the Selective Service Act. The reason appellant cites no cases in point to give him comfort is because undoubtedly there are none. Appellee has searched the authorities; the *Trailmobile* case is the only one he has found exactly in point, but this single case, in the light of the statute involved and the unequivocal declaration made therein by the Court of Appeals for the Sixth Circuit is adequate to sustain the Court below:

“This declaratory judgment of the state court is not binding upon this court. If recognized here, the judgment of the Ohio courts would nullify the right of the appellee Whirls to his seniority status as an employee of the appellant company as of February 8, 1935. His seniority status as of that date is, as we have already shown, guaranteed by the Selective Training and Service Act as long as the Act remains in effect and as long as Whirls remains in the service of the appellant company.”

Much has been said by appellant about the State Court's decision being adverse to the appellee. It

must be remembered, however, that it was Tsang who originally harassed Kan in the State Court by first filing a suit for declaratory relief, thus compelling Kan to file a cross-complaint. (See footnote, p. 5 of Appellant's Opening Brief.)

In this connection appellee can only conjecture whether the State Courts would have decided, as did the Court below, that an offer of any salary less than \$750 a month did not satisfy the requirements of the Selective Service Act, had this question been squarely presented. That the appellant would not under any circumstances pay appellee \$750 a month as the Court below found (Finding of Fact XIII, *supra*), cannot be disputed. That this precise question of the \$750 monthly salary was not determined by the trial judge in the State Court proceedings may be clearly seen by a reading of the Findings which he approved. (See p. 5 of Appellant's Opening Brief.) Be that as it may, appellee, as he has already stated, relies on the case of *Trailmobile v. Whirls*, *supra*, and these words of the Court below:

“Respondents' defense of *res judicata* is based on the foregoing State Court proceedings. It is true that the State Court made a finding that respondent Tsang and the partnership had offered to restore Kan to the same position which he had held with the Cathay House corporation, but even assuming that such offer met the Act's requirements, this finding cannot bind a federal court * * *. The question for decision is then one of fact—did any offer of re-employment made by respondent to petitioner comply with the terms of the Act?”

III.

MUST THE VETERAN BE GIVEN THE BENEFIT OF ANY WAGE INCREASE OFFERED DURING HIS ABSENCE TO CONSTITUTE A COMPLIANCE WITH THE ACT?

Appellant in his second contention, in which he alleges not only that the award of damages is contrary to the evidence but also to the law applicable thereto, is challenging the Court's third proposition that failure to give the veteran the benefit of any wage increases accruing during his absence is not a compliance with the Act. Appellant does so on page 16 of his opening brief, in language and with reasoning difficult for appellee to understand:

“The District Court held that Kan actually was entitled to \$750 per month and that the employer breached his statutory obligations by not agreeing to restore the position at more than \$500 per month. (Tr. 26.)

In this respect we contend the court was in error. The former employee had the undoubted right to accept a lesser pay than the maximum to which he was entitled. When he told the employer that \$500 was the amount he ‘would be satisfied with’ there could have been no obligation, statutory or otherwise, upon the employer to *insist* upon him taking more. In the absence of an obligation, no one could be responsible for damages for a breach.”

In the face of such inconsistent reasoning by appellant appellee calls attention of this Honorable Court to the following declaration the Court below made in its opinion, in which in support thereof it

cited, *Salter v. Becker Roofing Co.*, 65 Fed. Supp. 633; *Parker v. Boyce*, 74 Fed. Supp. 581, and the as yet unreported case of *Covey v. Douglas Aircraft Co.* (S. District of California):

“So far as pertinent, the Act provides that if a position, other than a temporary position, was in the employ of a private employer, the person so employed shall be restored to such a position unless the employer’s circumstances have so changed as to make it impossible or unreasonable to do so. It is further provided that such restoration shall be without loss of seniority. The courts have been very liberal in construing these provisions, having in mind the purpose of the statute. They are more than patriotic promises. Rather, they are a guarantee to the honorably discharged veteran that, upon application timely made, he will be restored to his former position or to one of like seniority, status and pay and that he will lose no seniority in the process. If during the veteran’s service in the armed forces, the person filling his position receives a higher salary, an offer to reemploy the veteran at his old salary is not a compliance with the Act. The veteran must be given the benefit of any wage increases that have been made during his absence.”

In *Parker v. Boyce*, *supra*, the Court held that the veteran whose salary, prior to his entry into the service, as manager of an advertising business had been \$300 a month, was entitled to reinstatement at \$600 a month, which was the salary of the incumbent manager upon the veteran’s return from military service.

instatement for a period greater than twelve months, and who before the Court during trial waives his claims of reinstatement is at the least entitled to receive twelve months back pay, with all increases accruing to the position during his service in the armed forces, less what he actually earned during this period in other employment. As a matter of fact, appellee is entitled under the Act not only to damages for loss of wages but also reinstatement for a period of one year. Section 8(e) of the Act requires the employer to compensate the veteran for any loss of wages suffered by reason of failure to reemploy. Accordingly, back pay continues until the actual date of restoration, or waiver thereof. The one-year provision in Section 8(c) cannot therefore be considered a limitation on back pay claims, since the one year period is measured from the date of restoration to the job. Thus, following the specific language of the Act, the veteran is entitled to back pay until he is restored to his job, and is also entitled to claim immunity from discharge without cause for one year after such restoration, regardless of when it takes place. If we assume, but for purpose of discussion only, that the provision of Section 8(c) is a limitation, then the veteran is entitled only to back pay or reemployment or both, for a total period of not more than a year, but certainly nothing less than that. For example, a veteran who is restored to work six months after he was unlawfully refused reemployment would be awarded six months back pay and employment for the balance of a year. If, as in our case at bar, the

veteran is refused reemployment for a period greater than one year he would be entitled to back pay for a year. The Court below, in view of appellee's waiving his right of reemployment and back pay for the period in excess of one year, properly ordered that there be entered "judgment in favor of the petitioner in the sum of \$7421.28, that being twelve months back pay at \$750 a month less \$1518.72 earned by him from December 4, 1943, the date of his application for reinstatement, to December 4, 1944."⁴ The damages so awarded were compensatory and not punitive and based on the fact that the appellee had actually suffered a loss of \$7421.28 from December 4, 1943, to December 4, 1944, as a result of the employer's unlawful act.

A reading of the appellant's opening brief, and particularly the third and fourth contentions therein, shows that he does not challenge the Court's fifth proposition as such but that he insists that it is not applicable to appellee under the circumstances of this particular case. It is difficult for appellee to comprehend the arguments of appellant in support of his third and fourth contentions that (3) "The expiration of the partnership barred any relief," and that (4) "The petitioner was estopped from any relief." On page 17 of his opening brief appellant asserts that:

"This returns us to the solemn assurance in 1946 by counsel for the petitioner that the Fed-

⁴Appellee was very fair and diligent in seeking other employment and mitigating damages. (Tr. p. 139.) For rule on mitigation of damages see *Doane Co. v. Martin*, supra.

eral Court could and should take jurisdiction because the reemployment was the only relief sought herein, while conceding that it already had been competently adjudicated that he was entitled to no damages.

However, when realization of this point was reached, petitioner reversed to the exact opposite position and the only relief granted by the District Court was for damages."

A careful reading of the Transcript of Record will show no such "solemn assurance," as a reading of appellant's opening brief shows no cases to support his third and fourth contentions.

As, what appears to be, an afterthought on the part of the appellant, although not a direct challenge to the Court's first proposition, *supra*, he argues that since the partnership term expired in October, 1946, and the trial and judgment were not until the following year, the appellee could not be reinstated either voluntarily or by Court order.

Appellee, as has been pointed out, waived his right or reinstatement, but if he had not done so the Court under the cases cited in the footnote of the opening paragraph of this argument, could have ordered his reemployment because after the partnership was dissolved appellant purchased the Cathay House and conducted the business as before, a restaurant for profit. Appellant complains that it was appellee who prayed for a dissolution of the partnership in the State Court. That is immaterial in view of the ap-

pellee's waiver of reinstatement before the Court below, but lest appellant attempt to derive satisfaction from the fact that it was Kan who filed the suit for dissolution it should be added here that such action was more than warranted by the unprovoked and unjustified attack which appellant made on appellee's reputation and character in a letter to the other members of the partnership (Appellee's Exhibit 5, Tr. 115-117), a letter completely uncalled for and without foundation. Appellant pleads the doctrine of estoppel, but where is the prejudice to him to sustain this plea? There is none. The Court's finding adequately disposes of that allegation:

“Respondent Tsang in no way has been injured by petitioner's delay in instituting this action, such delay having been occasioned by the proceeding in the state court instituted, as hereinabove stated, by the respondent Tsang. Respondent Tsang has likewise not been injured by the appellee in bringing this case to its conclusion, the greater part of such delay being the result of a stipulation between counsel herein. The remaining respondents likewise have not in any way been injured by the delays hereinabove set forth.”

(Findings of Fact XVII.)

Appellant also complains that if appellee had a claim for damages for back pay he should have filed it with the Receiver in the State Court proceedings. The Selective Service Act does not impose such obligation on the veteran whose rights have been violated, and by appellant's admission in the footnote on page

3 of his opening brief he alone under Section 2483 of the California Civil Code is the only one responsible for the debts of the enterprise, Cathay House, the other partners being invulnerable.

CONCLUSION.

The Selective Service Act charges the United States Attorney with the responsibility of representing the veteran in the Federal Courts if, in his opinion, the veteran's rights have been denied him by his employer. He, of course, cannot appear on behalf of the veteran in any State proceedings. Just as no presumption in favor of the employer, Tsang, obtains by virtue of the judgment in his favor in the State Courts, so no presumption can be indulged in on the veteran Kan's behalf merely because the United States Attorney felt that his cause was a just cause. The United States Attorney, however, in determining whether or not he would be justified in representing a veteran in a reemployment case has been particularly moved by these significant pronouncements of other Federal tribunals which he most respectfully calls to the attention of this Honorable Court in the firm belief that they will be of great assistance in the rendering of a decision as law and justice and equity require:

“When a man or woman returned from the service is denied reemployment, the testimony in support of the refusal to so reemploy must be clear, unequivocal and convincing before the Court would be justified in holding that the service man or woman should be denied such reemployment, particularly where an attempt is made

to set aside a solemn promise emanating from the Government of the United States. In this class of cases the presumptions are that the service man or woman is entitled to be reinstated. The immense importance and necessity of the welfare of the one who has served, or who will hereafter serve in the armed forces of the United States, and the welfare of our country as a whole, demand that such refusal should only be successful when the defense is clearly stated and fully substantiated by the proof."

Anderson v. Schouwerer, 63 F. Supp. 808.

"The policy of the Act is stated in Section 1(b), 50 U.S.C.A. App. Sec. 301(b), to be that the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system * * * though such declaration was hardly needed. Every consideration of fairness and justness makes it imperative that the statute should be construed as liberally as possible, so that the military service should entail no greater setback in the private pursuit or career of the returning soldier than is unavoidable. The question here presented, therefore, is not to be solved by the application of abstract tests or formulae; but the factors which usually determine the nature of a disputed relationship must be considered in the light of the purpose which Congress intended to accomplish."

Kay v. General Cable Corp. (C.C.A. 3), 144 F. (2d) 653.

"Promises made to our service men are not to be construed as idle promises, but should be construed as a solemn obligation that the agreements

we have made with them will be lived up to and enforced. To look for technical loopholes which may relieve us of our responsibilities is unthinkable, where the returning service man's interest is at stake, and if there is a doubt as to whether a particular matter is within the scope of the civil relief Act, that doubt should be resolved in favor of the soldier, and in this case the cancellation of the contract is construed by this court as a violation of the agreement and understanding had with defendants at the time of the plaintiff's entry into the service and also as an act prohibited under the Soldiers' and Sailors' Civil Relief Act. If the court is wrong in its judgment this law should be amended so that the men and women in the service will not be fooled into believing that his or her civil rights are secure while they are away fighting for their country."

Stockton v. Ford Motor Co., 61 F. Supp 261.

In view of the foregoing it is respectfully urged that the judgment of the Court below is correct and should be affirmed.

Dated, San Francisco, California

October 1, 1948

FRANK J. HENNESSY,

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(Appendix Follows.)

Appendix.

Appendix

The pertinent portion of Section 8 of the Selective Training and Service Act of 1940, as amended (50 U.S.C.A. App. 308) reads as follows:

“(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year.

* * * * *

“(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave

of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action."

The pertinent portion of Section 7 of the Service Extension Act of 1940, as amended (50 U.S.C.A. App. 357), reads as follows:

"(a) Any person who subsequent to May 1, 1940, and prior to the termination of the authority conferred by Section 2 of this joint resolution, shall have entered upon active military or naval service in the land or naval forces of the United States shall be entitled to all the reemployment benefits of Section 8 of the Selective Training and Service Act of 1940, as amended, to the same extent as in the case of persons inducted under the Act."

Section 2 of the Service Extension Act of 1940, as amended, above referred to, reads as follows:

“The President is hereby authorized, subject, however, to the condition hereinafter stated, to extend, for such periods of time as may be necessary in the interests of national defense, the periods of service, training and service, enlistment, appointment, or commission, of any or all persons inducted for training and service under the said Act members and units of the reserve components of the Army of the United States (including the National Guard of the United States), retired personnel and enlisted men of the Regular Army, and any other members of the Army, who are now, or who may hereafter be, in or subject to active military service, or training and service: *Provided*, That extension of the periods of active military service, or training and service, in the case of any person subject to the provisions of this section, shall not, without this consent, exceed eighteen months in the aggregate; except that whenever the Congress declares that it is in the interests of national defense to further extend such periods of active military service and training and service, such periods may be further extended by the President, in the case of any such persons, for such time as may be necessary in the interests of national defense: *Provided further*, That the authority hereby conferred is subject to the condition that the delegation of such authority may be revoked at any time by concurrent resolution of the Congress.” Aug. 18, 1941, c. 362, § 2, 55 Stat. 626; 50 U.S.C. App. 352.



No. 11,891

IN THE
United States
Court of Appeals
For the Ninth Circuit

ERNEST TSANG,

Appellant,

VS.

JOHN JOSEPH KAN,

Appellee.

Appellant's Reply Brief

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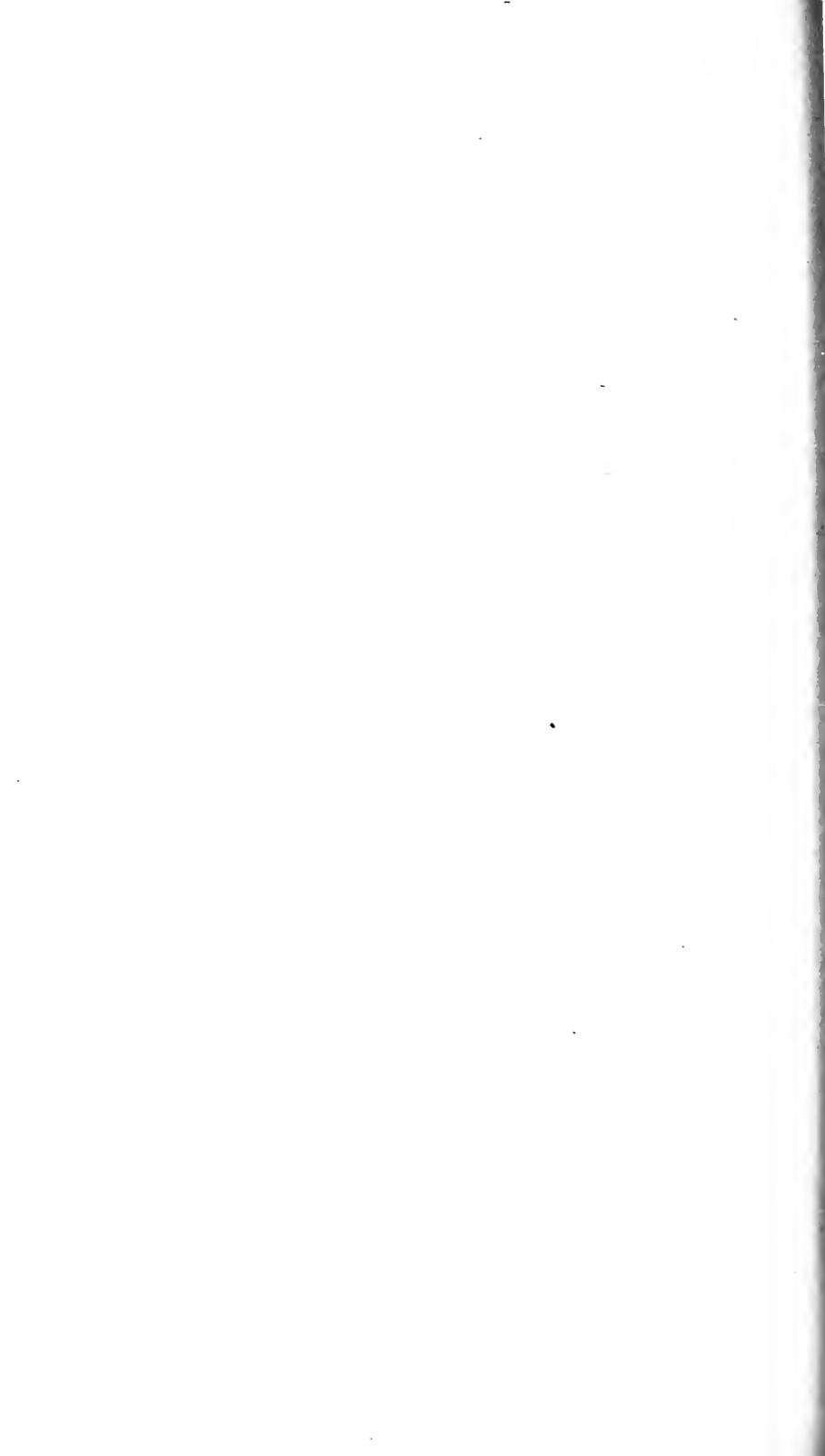


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No. 11,891

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Appellant's Reply Brief

PREFACE

We have been served with a "Brief for Appellee." A reading of it leads us to the conclusion it best could be designated as "Confession of Error and Stipulation for Reversal."

The outstanding phase of this document is that it deeply submerges within its covers* its only treatment on the subject of Res Judicata, the appellant's primary and cardinal point of appeal.

*Only two pages (pages 26 and 27) in a forty page brief.

The Appellant's Opening Brief devotes more than half of its volume (pp. 7-15) to "ARGUMENT (1) The Judgment Appealed from is Contrary to Law in That the Judgment of the State Court Was Res Judicata."

As just noted, the almost imperceptible reply thereto is contained in but two pages and consists only of one (1) citation, that entirely inapposit.

THE RELIEF GRANTED BY THE DISTRICT COURT WAS BARRED BY RES JUDICATA

It is immediately apparent from his lack of denial, Appellee concedes the basic elements of the plea of res judicata:

(1) The state court had jurisdiction of both the persons and subject matter.

(2) The state court action involved the same persons, namely Ernest Tsang and John Joseph Kan (Appellant and Appellee, herein).

(3) The state court action involved the same factual subject matter.

(4) The state court in that action did adjudicate certain facts as between said persons.

(5) That adjudication was appealed by Kan, affirmed by the appellate court and long since has become final.

(6) If there be accepted the facts as adjudicated by the state courts, the monetary relief granted by the district court was contrary to law.

The Appellee's answer thereto (pp. 26 and 27, Brief for Appellee) is:

(1) (p. 26) Res judicata does not apply according to the decision of the Sixth Circuit in *Trailmobile v. Whirls*, 154 Fed. 2d 866.

(2) (p. 27) Tsang "harassed Kan in the State Court by * * * filing a suit for declaratory relief, thus compelling Kan to file a cross-complaint."

The answer to the latter, obviously is that Tsang's complaint in declaratory relief (received in evidence in the district court) averred it was Kan who was making various and sundry charges, that Tsang could not make out what they were and therefore *invited* Kan to state them in open court, or otherwise forever hold his peace; that Kan was represented by two able attorneys (one a former superior court judge); that knew they could have moved the case to the United States District Court (Tr. p. 105), but voluntarily elected to, and did, voluntarily submit their issues to the superior court by an answer affirmatively setting up Kan's claims for damages.

That leaves for disposition, just the one question of whether there is anything in the *Trailmobile decision* that distinguishes the law of res judicata as stated in the plethora of authority contained in our Opening Brief (pp. 9-15).

We urge that *Trailmobile v. Whirls* is patently inapplicable. In the first place, the factual situation was completely different. The state court action was not between the same parties, but was a "class action" brought by one Hess on behalf of all persons similarly situated.

That portion of the *Trailmobile* opinion dealing with the point of res judicata, commences on page 871, headnote

(6). Its holding affirming the district court can be epitomized:

(1) "The interpretation by the state court of the rights of a citizen under a federal statute is not binding upon the federal courts." (p. 871)

(2) "There is another ground * * * The Hess case was not an appropriate class action in which the judgment entered could be binding upon Whirls, inasmuch as he was not similarly situated with all the parties in whose behalf the class action was instituted in the state court by Hess * * *." (pp. 871-2)

In considering its first and main point, there should be noted that this opinion contains no citation of authority for the quoted assertion; that it bears no approval of the United States Supreme Court in that the latter reversed the judgment* (Appellee's Brief, p. 26). Most particularly it should be appreciated that the quoted tenet is limited to "rights," (i.e. questions of law), and not to adjudications of facts.

From the inception of this case in the federal jurisdiction, by our answer filed and ever since, we have emphasized that we depend our special defense upon the state court's adjudication of historical facts and not its adjudication of legal rights incident thereto.†

The findings of *fact* made by the state court were received in evidence in the district court, pursuant to our

*The reversal was not as cited in Appellee's Brief p. 26, but 331 U.S. 40. The opinion there of Judge Rutledge is worthy of note.

†"Our primary contention always has been and now is that the findings of the State Court as to the *facts* precluded the Federal or any other court from subsequently finding those facts to be to the contrary; * * *." (Opening Brief, p. 7).

plea of *res judicata*. Heretofore they have been summarized (Opening Brief, p. 5), including that the partnership had offered Kan, within three months after his return from service, his same job and that Kan refused to accept it; that Kan had never offered to return and Kan had suffered no damages whatsoever; that Kan was an unfit person to be reemployed, judging by his actions following his release from the army.

Well may it be as stated in the *Trailmobile case*, that a state court may not oust the federal court of the latter's prerogative of adjudicating the legal rights arising under a federal statute. Nowhere does it purport to claim, however, that the latter is not bound by a state court adjudication of the factual relations between two of its citizens voluntarily submitting their controversy.

The whole distinction is highlighted (to the favor of our contention) by the district court's opinion filed in this case, where it is quoted in Appellee's Brief (p. 27):

“* * * this finding (of the state court) cannot bind a federal court * * *. The question for decision is then one of fact * * *.”

In other words, the district judge construed the *Trailmobile decision* as authority that the superior court's *findings of fact* were not binding on him. We cannot agree that the Sixth Circuit made any such holding.

As to the second point of the *Trailmobile decision*, the only one to which detailed consideration was given in the opinion, it held that the previous suit by Hess did not bind Whirls. To the contrary, in the present case the state court action was between the identical persons as in the present suit.

